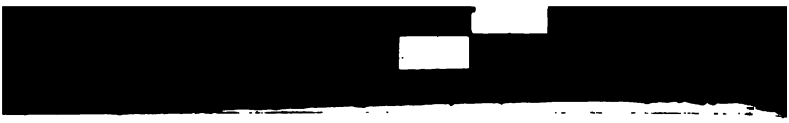

A TREATISE

ON

THE LAW OF CRIMES

BY

WM. L. CLARK

AND

WM. L. MARSHALL

IN TWO VOLUMES
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CHAPTER VII.

OFFENCES AGAINST THE PROPERTY OF INDIVIDUALS.

I. LARCENY.

(A) In General.

303. Definition and Classification.—Larceny is of two kinds, namely:

1. Simple larceny, and
2. Compound larceny.

Simple larceny at common law is the taking and carrying away of the mere personal goods of another of any value from any place, with a feloni-

out intent to steal the same. This definition includes the following elements:

1. The subject of the offense must be the mere personal goods of another. Other things, however, are made the subject of larceny by statute.
2. The goods must be taken, and the taking must be under such circumstances as to amount technically to a trespass.
3. There must be some asportation or carrying away of the goods.
4. Both the taking and the carrying away must be with a felonious intent,—an intent to steal,—existing at the time.

Grand and Petit Larceny.—By statute in some jurisdictions larceny has been divided, according to the value of the property or other circumstances, into

1. Grand larceny, and
2. Petit larceny.

Compound larcenies are larcenies committed under certain aggravating circumstances. Thus—

1. At common law, robbery, which is larceny from the person or in the presence of another by violence or by putting him in fear, is a compound larceny.
2. By statute in most jurisdictions, it is a compound larceny, punished more severely than simple larceny, to steal—
   (a) From the person of another, or
   (b) From a dwelling house, or certain other places specified in the statute.

And the same is true of things which are temporarily annexed, and which are intended to be removed, and may be removed without injury to the freehold, as in the case of leather belts connecting the wheels in a sawmill.[10] In some jurisdictions statutes have been enacted making it larceny to take and carry away fixtures with felonious intent.

(*c*) *Severance of Property before Taking*—(1) *By the Owner or by a Third Person.*—Things which constitute a part of the realty may acquire the character of personalty by being severed by the owner, or by a third person, and they then become the subject of larceny even at common law.[11] After the owner of land has cut down his trees, har-

[10] Reg. v. Hedges, 1 Leach, C. C. 201, 2 East, P. C. 590, note; Langston v. State, 96 Ala. 44; Jackson v. State, 11 Ohio St. 104.

In Reg. v. Hedges, supra, a window frame, not hung or beaded into the window frame, but fastened there by laths nailed across, so as to prevent it from falling out, was held to be the subject of larceny, as such a temporary fastening did not make it a part of the realty. So of a bell in a chapel, if not fixed. Rex v. Nixon, 7 Car. & P. 442.

[11] Severance of ore, as of a nugget of gold, by natural causes, is not such a severance as to make

vested his crops, or gathered his vegetables or fruit, they are no longer real property, and may afterwards be stolen.[12] The same is true when he has drawn turpentine or maple syrup from the tree,[13] cut ice from a river or pond,[14] mined coal or ores,[15] or confined natural gas, water, or oil in pipes.[16] On the same principle, buildings, pipes, and other fixtures are personal property after they have been severed from the realty by the owner,

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it personal property, and the subject of larceny. State v. Burt, 64 N. C. 619; ante, § 652, note.

[12] 3 Inst. 109; 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; 1 East, P. C. 587; Year Book 19 Hen. VIII. 2 pl. 11, Beale's Cas. 490; State v. Parker, 34 Ark. 158, 36 Am. Rep. 5; Bradford v. State, 6 Lea (Tenn.) 634; Bell v. State, 4 Baxt. (Tenn.) 426.

[13] State v. Moore, 11 Ired. (N. C.) 70.

[14] Ward v. People, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144.

[15] People v. Williams, 35 Cal. 671; State v. Berryman, 8 Nev. 262.

[16] As to water, see Ferens v. O'Brien, 11 Q. B. Div. 21, 15 Cox, C. C. 332.

As to gas, natural or manufactured, see Reg. v. White, 3 Car. & K. 363, Dears. C. C. 303, 6 Cox, C. C. 213, 17 Jur. 536, Beale's Cas. 506; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 796, Beale's Cas. 501; State v. Wellman, 34 Minn. 221.

(B) The Subject of Larceny.

304. In General.—At common law the subject of larceny must be the mere personal goods of another. Therefore,

1. **It must be personal, as distinguished from real property.**
2. **It must be something which the law recognizes as property and the subject of ownership.**
3. **It must be of some value, but the least value to the owner is sufficient.**
4. **It must be the property of another. But a special property in another is sufficient, even as against the general owner; and mere possession is enough as against others than the owner.**

305. Real Property.

(*a*) *In General.*—Real property is not the subject of larceny at common law. The property must be personal,—the "mere personal goods" of another.[1] At common law, therefore, it is not larceny, but a mere trespass, to sever and immediately carry away trees, grass, crops, fruit, vegetables, and the like.[2]

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[1] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 1; 2 East, P. C. 587; 4 Bl. Comm. 232.

[2] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; 2 East, P. C. 587; 4 Bl. Comm. 232; Anon, Year Book 11 & 12 Edw. III. 640, Beale's Cas. 488; Anon., Year Book 19 Hen. VIII. 2 pl. 11, Beale's Cas. 490; Holly v. State, 54 Ala. 238; Bradford v.

The same is true of ores and minerals before they have been mined,[3] ice before it has been cut,[4] and turpentine or maple syrup before it has been drawn from the trees.[5]

The common-law rule that real property cannot be the subject of larceny has been changed to some extent by statute both in England and in this country. Thus, it is made larceny in some jurisdictions to steal out-

State, 6 Lea (Tenn.) 634; Bell v. State, 4 Baxt. (Tenn.) 426.

At common law, title deeds and the boxes containing them, and other instruments concerning real property, such as a commission out of a court of chancery to settle the boundaries of a manor, were held not to be the subject of larceny, "because they savour of the same nature." 2 East, P. C. 596; 1 Hale, P. C. 510; Rex v. Wody, Year Book 10 Edw. IV. pl. 9, 10, Beale's Cas. 489; Rex v. Westbeer, 2 Strange, 1133, 1 Leach, C. C. 12.

[3] People v. Williams, 35 Cal. 671; State v. Burt, 64 N. C. 619. It makes no difference that the ore has been severed from the land by natural causes, and is lying loose upon it, for this does not change its character as real property. State v. Burt, supra. And see Com. v. Steimling, 156 Pa. St. 400, Beale's Cas. 588.

[4] Ward v. People, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144.

[5] See State v. Moore, 11 Ired. (N. C.) 70.

standing crops, though the severance and the carrying away may be one continuous act.[6]

(*b*) *Fixtures.*—For the same reason it is not larceny at common law to sever and immediately carry away fixtures,—that is, property which is so annexed to the land by man as to acquire the character of real property, such as the whole or part of a building or fence,[7] or water pipes, gas pipes, doors, mantles, windows, machinery, etc.[8] If a thing is

[6] See Holly v. State, 54 Ala. 238; State v. Stephenson, 2 Bailey (S. C.) 334.

[7] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; 2 East, P. C. 587; Rex v. Millar, 7 Car. & P. 665 (lead from the roof of a building); U. S. v. Wagner, 1 Cranch, C. C. 314, Fed. Cas. No. 16,630 (rails of a fence inserted in posts fixed in the ground); U. S. v. Smith, 1 Cranch, C. C. 475, Fed. Cas. No. 16,325 (logs in a fence). And see the cases cited in the notes following.

[8] 1 Hale, P. C. 510; Langston v. State, 96 Ala 44; State v. Hall, 5 Harr. (Del.) 492; State v. Davis, 22 La. Ann. 77. See, also, Ex parte Wilkie, 34 Tex. 155.

In State v. Davis, supra, it was held that a copper pipe affixed to an engine which was affixed by masonry to a building was realty, and not the subject of larceny. And State v. Hall, supra, and Langston v. State, supra, were to the same effect.

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nical, have refused to follow it to its logical extent. In Kentucky, for example, chandeliers were held to be the subject of larceny, though they were attached to pipes in a building, and it was conceded that they were so far a part of the realty that they would pass as such on a sale of the building. The court said: "The modern authorities, instead of following the common-law doctrine on the subject, apply it only to things issuing out of or growing upon the land, and such as adhere to the freehold, but not to personal chattels that are constructively annexed thereto." Smith v. Com., 14 Bush. (Ky.) 31, 29 Am. Rep. 402. See, also, Jackson v. State, 11 Ohio St. 104.

This decision, as was conceded by the court, was certainly a departure from the common-law rule, and there is no principle upon which it can be sustained. If the common law is defective in this respect, it is for the legislature, not the courts, to supply the remedy.

[9] Rex v. Hedges, 1 Leach, C. C. 201, 2 East, P. C. 590, note; Rex v. Nixon, 7 Car. & P. 442; Hoskins v. Tarrance, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129.

A key, though in the lock of a door in a house, is personal property, and the subject of larceny. Hoskins v. Tarrance, supra.

or by a third person, and are then the subject of larceny.[17]

(*2*) *Severance by the Trespasser.*—The severance need not necessarily be by the owner, or by a third person. It may be by the thief himself, provided the severance and the carrying away are separate and distinct acts, and not parts of one continuous transaction.

To constitute larceny, it is not only necessary that the property shall be personal, but it is also necessary, as we shall presently see, that it shall be taken, while of that nature, from the actual or constructive possession of the owner.[18] It necessarily follows that if the severance and carrying away by the trespasser are parts of one continuous transaction, there is no larceny, for there is no time between the severance and the carrying away during which it can be said that the property, in its new character as personalty acquired by reason of the severance, is in the actual or constructive possession of the owner, but from the time it is severed to the time it is

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[18] Post, § 686.

carried away it is in the continuous possession of the trespasser.[19]

On the other hand, if a trespasser severs property from the realty, thereby converting it into personalty, and leaves it on the land of the owner, relinquishing his possession of it, the owner acquires the constructive possession of it in its new character as personalty, and, if the trespasser returns and carries it away with the necessary felonious intent, he is guilty of larceny.[20]

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[19] 1 Hale, P. C. 510; 4 Bl. Comm. 232; Reg. v. Foley, L. R. 26 Ir. 299, 17 Cox, C. C. 142, Beale's Cas. 581; People v. Williams, 35 Cal. 671; State v. Hall, 5 Harr. (Del.) 492; State v. Berryman, 8 Nev. 262; State v. Burt, 64 N. C. 619; Bradford v. State, 6 Lea (Tenn.) 634; Bell v. State, 4 Baxt. (Tenn.) 426.

In Ex parte Willke, 34 Tex. 155, it was held that a man is guilty of larceny in severing and carrying away doors from a house, even though he may carry them off immediately after the severance, but no authorities were cited for this departure from the common-law doctrine, and the decision is clearly wrong.

[20] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 21; 2 East, P. C. 587; 4 Bl. Comm. 232; Reg. v. Foley, L. R. 26 Ir. 299, 17 Cox, C. C. 142, Beale's Cas. 581; People v. Williams, 35 Cal. 671; State v. Moore, 11 Ired. (N. C.) 70; Com. v. Steimling, 156 Pa. St.

Time Intervening Between Severance and Asportation.—According to the better opinion, no particular time need elapse between the severance and the carrying away, in order to make them separate and distinct transactions, but it is sufficient if the two acts are so separated as a matter of fact as not to constitute one transaction. All that is necessary is that the property shall have come into the actual or constructive possession of the owner before being finally taken and carried away.[21]

400, Beale's Cas. 588; Bradford v. State, 6 Lea (Tenn.) 634; Bell v. State, 4 Baxt. (Tenn.) 426.

In Reg. v. Foley, supra, the accused cut hay on another's land, and left it lying there. After several days, he returned and carried it away, with a felonious intent. It was held that the severance of the hay made it personal property, that, between the time it was cut and left lying on the land and the time it was carried away, it was in the constructive possession of the owner of the land, and that, when the accused returned and carried it away, he took it, in its new character as personalty, from the owner's possession, and was therefore guilty of larceny.

[21] As to the time intervening between the severance and the carrying away which will make them separate and distinct acts, instead of parts of one continuous transaction, nice distinctions

The mere fact that an interval of time may elapse between the severance and the carrying away does not make the act larceny, if the trespasser does not relinquish his possession, for, so long as he has possession, the owner cannot acquire it.[22]

Intention to Abandon Property.—It seems to have been held that there must have been an intention to abandon the property between the severance and the carrying away, and that it is not enough merely to show that the severance and the carrying away were separate transactions.[23] This doctrine, however,

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have been made in some cases. For instance, it was once held that a day must intervene, because of the rule that the law does not recognize fractions of a day. The doctrine, however, is now generally recognized as stated in the text. 2 Bish. New Crim. Law, § 766 (1); Holly v. State, 54 Ala. 238; People v. Williams, 35 Cal. 671; State v. Berryman, 8 Nev. 262; Bradford v. State, 6 Lea (Tenn.) 634.

The trespasser need not go off the land after severance of the thing, and before carrying it away. Bradford v. State, supra. See, also, Com. v. Steimling, 156 Pa. St. 400.

[22] Reg. v. Foley, L. R. 26 Ir. 299, 17 Cox, C. C. 142, Beale's Cas. 581.

[23] Reg. v. Townley, L. R. 1 C. C. 315, 12 Cox, C. C. 59, 24 L. T. (N. S.) 517, Beale's Cas. 577.

if it has ever really been held, cannot be sustained. As was said in a leading English case: "Where chattels, after severance, are left on the property of the true owner, no matter what the wrongdoer's intention may be, he cannot escape the common-law doctrine, if his possession is not in fact continuous. Continuity of intention is not the equivalent of continuity of possession." [24]

306. Water and Gas.

Water and gas are the subject of larceny after they have been confined in pipes or otherwise reduced to possession.[25]

307. The Subject of Larceny must be Property and the Subject of Ownership.

To be the subject of larceny, the thing taken must be something which the law recognizes as property, and as the subject of ownership. For this reason, treasure trove, a

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[24] Per Gibson, J., in Reg. v. Foley, L. R. 26 Ir. 299, 17 Cox, C. C. 142, Beale's Cas. 581.

[25] Illuminating gas: Reg. v. White, 3 Car. & K. 363, Dears. C. C. 203, 6 Cox, C. C. 213, Beale's Cas. 506; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706, Beale's Cas. 501; State v. Wellman, 34 Minn. 221.

Water: Ferens v. O'Brien, 11 Q. B. Div. 21, 15 Cox, C. C. 332.

wreck not seized, seaweed not reduced to possession, and things abandoned by the owner were not the subject of larceny at common law.[26]

The same is true of a dead human being,

[26] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, § 24; 2 East, P. C. 606.

In Reg. v. Clinton, Ir. R. 4 C. L. 6, it was held that drifted and ungathered seaweed, cast on the shore, between high and low water mark, was not the property of the persons who had exclusive ownership of the shore, and that it was not the subject of larceny.

In State v. Taylor, 27 N. J. Law, 117, 72 Am. Dec. 347, Beale's Cas. 498, it was held that planting oysters in the public waters is not an abandonment of them to the public, so as to prevent them from being the subject of larceny, if the bed is so marked as to be capable of identification, and is not a natural oyster bed.

In Reg. v. Edwards, 13 Cox, C. C. 384, 36 L. T. (N. S.) 30, Beale's Cas. 612, three pigs which had been bitten by a mad dog were shot and buried on the owner's land three feet below the surface of the soil, without any intention of digging them up again, or of making any use of them. The defendants, on the same evening, dug them up and sold them. The jury found that there was no abandonment of the property in them by the owner, and convicted the defendant of larceny, and the conviction was sustained.

for the law recognizes no right of property therein.[27] It is larceny, however, to steal the coffin in which a dead body has been placed or interred, or to steal the clothes or other articles found upon a dead body or interred with it. They are not regarded as abandoned property, but the title is in the executor or administrator of the deceased, or in the person who buried him.[28]

308. Animals.

(*a*) *In General.*—Animals, including fish and birds, are as much the subject of larceny as any other property, if they are such that the law recognizes them as property and the subject of ownership, as in the case of horses, cattle, and domestic fowls.[29]

(*b*) *Animals Ferae Naturae.*—The law, however, does not recognize any right of property in animals *ferae naturae,* or wild animals, including wild fish and birds, so long

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[27] Rex v. Haynes, 2 East, P. C. 652.

[28] 2 Inst. 166; 1 Hawk. P. C. c. 33, § 29; Haynes' Case, 12 Coke, 113; State v. Doepke, 68 Mo. 208, 30 Am. Rep. 785; Wonson v. Sayward, 13 Pick. (Mass.) 402, 23 Am. Dec. 691.

[29] 1 Hale, P. C. 511; 1 Hawk. P. C. c. 33, § 28; 2 East, P. C. 614; State v. Turner, 66 N. C. 618.

as they are in their natural state, and it is not larceny to take them in that state.[30]

(*c*) *Animals Reclaimed or Killed.*—But animals of this description may become property, and the subject of larceny, by being tamed or otherwise reclaimed, or by being killed. All of the authorities agree that this is so if they are fit for food or the production of food,[31] as in the cases referred to in the note below.[32]

Killing and Taking must be Separate Acts.—What has been said in dealing with the

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[30] 1 Hale, P. C. 510; 1 Hawk. P. C. c. 33, §§ 25, 26; 2 East, P. C. 607; 4 Bl. Comm. 235; Anon., Year Book 19 Hen. VIII. 2, pl. 11, Beale's Cas. 490; Reg. v. Townley, L. R. 1 C. C. 315, 12 Cox, C. C. 59, 24 L. T. (N. S.) 517, Beale's Cas. 577; Reg. v. Petch, 14 Cox, C. C. 117, 38 L. T. (N. S.) 788; Warren v. State, 1 G. Greene (Iowa) 106 (coon); Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348 (doves); State v. Krider, 78 N. C. 481 (fish); Pennsylvania v. Becomb. Add. (Pa.) 386.

"Larceny cannot be committed of things that are ferae naturae, unreclaimed, and nullius in bonis, as of deer or conies, though in a park or warren, fish in a river or pond, wild fowl, wild swans, pheasants." 1 Hale, P. C. 510, 511.

[31] 1 Hale, P. C. 511; 1 Hawk. P. C. c. 33, § 26; 2 East, P. C. 607. See Hundson's Case, 2 East,

larceny of things annexed to land by a severance and a subsequent taking and asporta-

P. C. 611; Blades v. Higgs, 11 H. L. Cas. 621; and the cases cited in the note following.

[32] Tame doves or pigeons, when in an ordinary dove cote or in boxes on a building, though they have free egress, and may be at liberty to come and go, Reg. v. Cheafor, 2 Den. C. C. 361, 5 Cox, C. C. 367, 15 Jur. 1065, Beale's Cas. 492; Rex v. Brooks, 4 Car. & P. 131; Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; but not while they are in flight away from the premises, and enjoying their natural liberty, Com. v. Chace, supra. Pea fowls: Anon., Year Book 19 Hen. VIII. 2, pl. 11, Beale's Cas. 490; Com. v. Beaman, 8 Gray (Mass.) 497.

Partridges or pheasants hatched and raised under a hen, so long as they are tame, and with the hen. Reg. v. Shickle, L. R. 1 C. C. 158, 11 Cox, C. C. 189, Beale's Cas. 496; Reg. v. Heal, 1 Fost. & F. 350; Reg. v. Cory, 10 Cox, C. C. 23, Beale's Cas. 497; Reg. v. Garnham, 8 Cox, C. C. 451, 2 Fost. & F. 347.

Bees in hives: State v. Murphy, 8 Blackf. (Ind.) 498; Harvey v. Com., 23 Grat. (Va.) 941.

Oysters planted in an oyster bed that is so marked as to be capable of identification, and that is not a natural oyster bed. State v. Taylor, 27 N. J. Law, 117, 72 Am. Dec. 347, Beale's Cas. 498. And see Fleet v. Hegeman, 14 Wend. (N. Y.) 42.

tion,[33] applies equally to the killing and stealing of animals *ferae naturae*. If the killing and carrying away constitute one continuous act, there is no larceny, for there is no time after the animal is killed, and before it is carried away, during which it can be said to be in the actual or constructive possession of the owner of the land.[34] But if an animal is killed and left on the ground, it becomes the property of the owner of the land, and is constructively in his possession, and, if the trespasser afterwards returns and carries it away, he is guilty of larceny.[35]

(*d*) *Animals of a Base Nature, and not Fit for Food.*—It is said in the early English authorities, and has been held in some of the cases, that animals *ferae naturae* are not the subject of larceny at common law even after they have been killed or reclaimed, if they are of a base nature, and not fit for food or the production of food, though they may be

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[33] Ante, § 305 c.

[34] Reg. v. Townley, L. R. 1 C. C. 315, 12 Cox, C. C. 59, 24 L. T. (N. S.) 517, Beale's Cas. 577.

[35] Reg. v. Townley, supra; Reg. v. Petch, 14 Cox, C. C. 117, 38 L. T. (N. S.) 788. See Blades v. Higgs, 11 H. L. Cas. 621.

valuable for other purposes.[36] Thus, it was held in England that it was not larceny to take and carry away tame ferrets, though it appeared that they were of value, and that they were actually sold by the taker.[37] And there have been decisions to the same effect in this country.[38] According to the better opinion, however, it is not necessary that the animal shall be fit for food or the production of food, but it is sufficient if it be fit for any other useful purpose.[39] Thus, in England, a tame hawk was held to be the subject of

[36] 1 Hale, P. C. 511, 512; 1 Hawk. P. C. c. 33, § 23; 2 East, P. C. 614; Rex v. Searing, Russ. & R. 350, Beale's Cas. 491; Warren v. State, 1 G. Greene (Iowa) 106.

Hawkins enumerated, as within this rule, "dogs, cats, bears, foxes, monkeys, ferrets, and the like." 1 Hawk. P. C., supra.

[37] Rex v. Searing, Russ. & R. 350, Beale's Cas. 491.

[38] See Warren v. State, 1 G. Greene (Iowa) 106, where it was held that a coon was not the subject of larceny. And see Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573, where it was held that a sable or marten was not the subject of larceny, by reason of its base nature, even after being caught in a trap, and while so confined.

[39] State v. House, 65 N. C. 315, 6 Am. Rep. 744. It was said in this case: "We take the true

larceny, as it was useful to "princes and great men" in their fowling sports.[40] And in this country it has been held to be larceny to take and carry away a tame mocking bird, which was valuable as a songster,[41] or an otter, which was valuable for its fur.[42]

(*e*) *Dogs.*—At common law, dogs, though they were treated as property to such an extent that, on the death of the owner, they went to his executor or administrator, and to such an extent that the owner could maintain a civil action against one who took or injured them, were not regarded as the subject of larceny, because they were regarded as of a base nature;[43] and this doctrine has been recognized by some of the courts in this country, even in late cases.[44] In most juris-

criterion to be the value of the animal, whether for the food of man, for its furs, or otherwise."

[40] 1 Hale, P. C. 512.

[41] Haywood v. State, 41 Ark. 479.

[42] State v. House, 65 N. C. 315, 6 Am. Rep. 744. The skins of deer and bear are the subject of larceny. Pennsylvania v. Becomb, Add. (Pa.) 886.

[43] 1 Hawk. P. C. c. 33, § 23; 2 East, P. C. 614; Reg. v. Robinson, Bell, C. C. 34, 8 Cox, C. C. 115, 5 Jur. (N. S.) 203.

[44] Ward v. State, 43 Ala. 161, 17 Am. Rep. 31;

dictions, however, dogs are now either expressly declared by statute to be the subject of larceny,[45] or they are held to be so either on the ground that they are recognized as property by statutes taxing them, or on the ground that the statutes defining larceny as the felonious taking and carrying away of "personal property," and statutes defining personal property, are broad enough to include dogs, or on the ground that the reason for the common-law rule is not now applicable.[46]

State v. Doe, 79 Ind. 9, 41 Am. Rep. 599; State v. Holder, 81 N. C. 527, 31 Am. Rep. 517; State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772; Findlay v. Bear, 8 Serg. & R. (Pa.) 571.

[45] Dogs were made the subject of larceny in England by the statute of 10 Geo. III. c. 18. And there are similar statutes in some of our states.

[46] Mullally v. People, 86 N. Y. 365, Beale's Cas. 502; People v. Campbell, 4 Park. Cr. R. (N. Y.) 386; Com. v. Hazlewood, 84 Ky. 681; State v. Brown, 9 Baxt. (Tenn.) 53, 40 Am. Rep. 81; Hurley v. State, 30 Tex. App. 333. And see State v. McDuffie, 34 N. H. 523, 69 Am. Dec. 516. Compare, as to the effect of taxation, State v. Doe, 79 Ind. 9, 41 Am. Rep. 599.

It has been held that a statute punishing the larceny of "goods and chattels" is merely declaratory of the common law, and does not make

309. Lost Goods.

Though there have been some decisions to the contrary, it is now well settled in most jurisdictions that lost goods are the subject of larceny.[47] "The owner, by losing them, is not divested of his property in them, nor is his title to them in the least degree impaired. It remains in him absolutely, and to all intents, as before. There is no difficulty in describing the ownership of it, in the indictment, according to the established rules of framing that instrument. The name of the owner must be stated, if it is known, and, if not, it may be alleged to be the property of some person unknown." [48]

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dogs the subject of larceny. See Reg. v. Robinson, Bell, C. C. 34, 8 Cox, C. C. 115; Ward v. State, 48 Ala. 161, 17 Am. Rep. 31; State v. Lymus, 26 Ohio, St. 400, 20 Am. Rep. 772.

[47] 2 East, P. C. 606; Ransom v. State, 22 Conn. 153; Tanner v. Com., 14 Grat. (Va.) 635; post, § 319.

[48] Ransom v. State, supra. As to what constitutes larceny of lost property, see post, § 319.

The Tennessee court has made a distinction between lost property and property that has been merely mislaid by the owner, and have held that mislaid property is the subject of larceny. Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am.

310. Property Unlawfully Acquired or Possessed.

The fact that property has been acquired or is possessed unlawfully, or even criminally, does not deprive it of its character as property, or outlaw it, so as to withdraw it from the protection of the criminal law, and prevent it from being larceny to feloniously take and carry it away. Thus, it has been held from a very early day that property may be stolen from one who has himself stolen it, and that the indictment may lay the ownership in him.[49] It is also larceny to feloniously take and carry away intoxicating liquors, or money derived from a sale thereof, though they may have been kept or sold in violation

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Dec. 644; Pritchett v. State, 2 Sneed (Tenn.) 285, 62 Am. Dec. 468; but that lost property is not, Porter v. State, Mart. & Y. (Tenn.) 226; Pritchett v. State, supra. And see People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462 (Thompson, C. J., dissenting). This distinction, however, is not sound, and there is no reason for it. See post, § 319 et seq., where the larceny of lost property is treated.

[49] Year Book 13 Edw. IV. 3b; 1 Hale, P. C. 507; Com. v. Rourke, 10 Cush. (Mass.) 397, 399; Ward v. People, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144, Beale's Cas. 595; post, § 313.

of law;[50] or property used for gaming in violation of law.[51]

311. Choses in Action.

At common law it is well settled that, while a mere piece of paper is the subject of larceny, a paper upon which a valid and existing agreement is written is not. The paper then becomes a mere chose in action, or, more properly speaking, mere evidence of a chose in action, and loses its value and existence as property. It is not larceny, therefore, at common law, to take and carry away a promissory note, bank note, bond, or any other writing evidencing a contract.[52] The

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[50] Com. v. Rourke, supra; Com. v. Coffee, 9 Gray (Mass.) 139.

[51] Bales v. State, 3 W. Va. 685.

[52] 2 East, P. C. 597; 4 Bl. Comm. 234; 1 Hawk. P. C. c. 33, § 22; Reg. v. Powell, 2 Den. C. C. 403, 5 Cox, C. C. 396, 16 Jur. 117; Reg. v. Watts, Dears. C. C. 326, 6 Cox, C. C. 304, 18 Jur. 192, Beale's Cas. 493; Gulp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; People v. Griffin, 38 How. Prac. 475; State v. Dill, 75 N. C. 257; Warner v. Com., 1 Pa. St. 154, 44 Am. Dec. 114; Thomasson v. State, 22 Ga. 499.

The fact that an agreement is not stamped as required by law does not invalidate it, so as to make it the subject of larceny as a mere piece

reason, it has been said, is that "the paper becomes evidence of a right, and ceases to have any existence as anything else," and, "though the evidence is stolen, the right remains the same." [53]

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of paper, where the stamp may be put upon it at any time, so as to render it admissible as evidence. Reg. v. Watts, supra.

[53] Per Baron Alderson, in Reg. v. Watts, supra. It has been held in England that a railroad ticket entitling the holder to travel on the railroad is the subject of larceny at common law. Reg. v. Boulton, 3 Cox, C. C. 578; Reg. v. Beecham, 5 Cox, C. C. 181. So, also, of a pawnbroker's ticket. Reg. v. Morrison, Bell, C. C. 158, 8 Cox, C. C. 194, 5 Jur. (N. S.) 604. In this case the ticket was distinguished from a chose in action as being a document importing property in possession of the holder.

It is very doubtful whether these decisions can be sustained at common law. Such tickets are certainly mere evidence of a contract,—mere choses in action,—and seem clearly to be within the general rule. See, in support of this view, State v. Hill, 1 Houst. C. C. (Del.) 420; Millner v. State, 15 Lea (Tenn.) 179.

A railroad ticket is within a statute making it larceny to steal "any instrument or writing whereby any demand, right, or obligation is created, * * * or any other valuable writing." Millner v. State, supra.

Statutes have been enacted in most jurisdictions changing this rule of the common law, and making choses in action generally, or particular kinds of choses in action, the subject of larceny. To sustain an indictment under such a statute, the thing taken must come strictly within the terms of the statute.[54] Whether a particular instrument is within a statute depends entirely upon the intention of the legislature, to be determined by a construction of the statute, and in the construction of the statutes the courts have sometimes differed.[55]

[54] Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; Damewood v. State, 1 How. (Miss.) 262; Johnson v. State, 11 Ohio St. 324; State v. Wilson, 3 Brev. (S. C.) 196; State v. Calvin, 22 N. J. Law, 207.

[55] In some jurisdictions, for instance, it has been held that an indictment would not lie for stealing bank notes under a statute making it larceny to steal "promissory notes." Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357. In others it has been held that bank notes are promissory notes, within the meaning of the statute. State v. Wilson, 3 Brev. (S. C.) 196.

In State v. Calvin, 22 N. J. Law, 207, it was held that choses in action were not within a statute punishing the stealing of "goods and chattels."

The statutes are not to be construed as making it larceny to take invalid or valueless instruments. The instrument must be valid, and must have "a legal entity as a matter of value." [56] It is sufficient, however, if it is of such a character as to be negotiable and good in the hands of a *bona fide* holder for value.[57]

See, also, U. S. v. Davis, 5 Mason, 356, Fed. Cas. No. 14,930. But in Corbett v. State, 31 Ala. 329, bank notes or bills were held to be "personal goods," within the meaning of a statute, and in McDonald v. State, 8 Mo. 283, they were held to be "personal property." See, also, U. S. v. Moulton, 5 Mason, 537, Fed. Cas. No. 15,827.

The term "effects" in a statute covers bills of exchange, promissory notes, etc. State v. Newell, 1 Mo. 248.

[56] Culp v. State, 1 Port. (Ala.) 33, 26 Am. Dec. 357; Wilson v. State, 1 Port. (Ala.) 118; People v. Loomis, 4 Denio (N. Y.) 380; State v. Tillery, 1 Nott & McC. (S. C.) 9.

Though a duebill is within a statute punishing the stealing of any order, bill of exchange, promissory note, "or other obligation" for the payment of money, it is not larceny to take and carry away a duebill that has been paid, as it has no force or effect as an obligation after payment. State v. Campbell, 103 N. C. 344.

[57] Thus, in Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455, under a statute making it lar-

312. Value.

To be the subject of larceny, the thing taken must be of some value,[58] but the least value is sufficient. It is larceny at common law to steal a piece of paper, or anything else that is property, though it may be of less value than the least known coin.[59] It is enough if the property be of any value to the owner, though it may be of no value whatever to any other person.[60]

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ceny to steal bank notes, it was held that bank notes were the subject of larceny after having been redeemed by the bank, as they could be reissued, and would be good in the hands of a bona fide purchaser for value. See, also, Starkey v. State, 6 Ohio St. 266.

[58] Wilson v. State, 1 Port. (Ala.) 118; Collins v. People, 39 Ill. 233; Payne v. People, 6 Johns. (N. Y.) 103 (where it was held that a letter was not the subject of larceny); State v. Tillery, 1 Nott & McC. (S. C.) 9; Wolverton v. Com., 75 Va. 909.

[59] Reg. v. Perry, 1 Den. C. C. 69, 1 Car. & K. 725, 1 Cox, C. C. 222. And see Reg. v. Morris, 9 Car. & P. 349; Reg. v. Rodway, 9 Car. & P. 784.

[60] Reg. v. Morris, supra; State v. Allen, R. M. Charlt. (Ga.) 518. The property need not be of the value of any known coin. Reg. v. Morris, supra; Wolverton v. Com., 75 Va. 909.

313. Ownership and Possession of the Property.

(*a*) *In General.*— To constitute larceny, the goods taken must be the property of another than the accused. This idea is expressed in all the definitions of the offense.[61]

(*b*) *Special Ownership or Possession in Another.*—It is not meant by this, however, that the general ownership must necessarily be in another. A special ownership or possession is enough. Thus, if goods are stolen from one who has himself stolen them, an indictment may be sustained laying the ownership in the thief.[62] Again, a person may be guilty of larceny in taking his own property from one who has a special right of property therein, as from a pledgee or mortgagee, or from an officer having possession by virtue of an execution or writ of attach-

[61] For this reason, one who has contracted to sell property to another cannot be guilty of larceny in taking the property, if the contract was made by him under duress, or if it is executory, so that no title has passed. Love v. State, 78 Ga. 66.

[62] 1 Hale, P. C. 507; Year Book 13 Edw. IV. 3b; Ward v. People, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144, Beale's Cas. 595; Com. v. Rourke, 10 Cush. (Mass.) 397, 399.

ment, or from any other bailee with a special right of property, and the indictment in such a case may lay the ownership in the pledgee, mortgagee, or officer, etc.[63] When a third person steals goods from a bailee having a special right of property therein, as from a pledgee, carrier, levying officer, etc., it may be treated as larceny either from the general owner or from the bailee, and the indictment may lay the ownership in either.[64] This principle does not apply to property in the hands of a servant. He has the bare custody, and not the possession, the possession being constructively in the master. If property in the hands of a mere servant is taken, it is a larceny from the master, and the ownership must be laid in the master.[65]

(*c*) *Joint Tenants and Tenants in Common—Partners.*—One of several joint ten-

[63] 1 Hale, P. C. 513; 1 Hawk. P. C. c. 33, § 30; 2 East, P. C. 558; Reg. v. Webster, 9 Cox, C. C. 13, Beale's Cas. 676; People v. Stone, 16 Cal. 369; People v. Thompson, 34 Cal. 671; Adams v. State, 45 N. J. Law, 448, Beale's Cas. 679; Palmer v. People, 10 Wend. (N. Y.) 165, 25 Am. Dec. 551; People v. Long, 50 Mich. 249. See post, § 331.

[64] In addition to the cases cited in the note preceding, see State v. Mullen, 30 Iowa, 203;

ants or tenants in common of property cannot commit larceny in taking the property, whatever his intent may be, "because one tenant in common taking the whole doth but what by law he may do." [66] The same is true of a partner.[67] It is otherwise by express statutory provision in some jurisdictions.

(*d*) *Husband and Wife.*—At common law, because of the unity of husband and

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Com. v. O'Hara, 10 Gray (Mass.) 469; State v. Gorham, 55 N. H. 152; Owen v. State, 6 Humph. (Tenn.) 330.

[65] Com. v. Morse, 14 Mass. 217; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551.

[66] 1 Hale, P. C. 513. See Bonham v. State, 65 Ala. 456. It is so by express provision of the Texas statute, unless the person from whom the property is taken is entitled to the exclusive possession. See Bell v. State, 7 Tex. App. 25; Fairy v. State, 18 Tex. App. 314. A part owner, however, may be guilty in taking the property from the possession of a third person, who is chargeable with its safe keeping. Rex v. Bramley, Russ. & R. 478.

[67] See the authorities cited in the note preceding.

A partner (as a member of an unincorporated society) may be guilty of larceny in taking funds from a copartner, where the latter has charge of the funds, and is bound to account for them. Reg. v. Webster, 9 Cox, C. C. 13, Beale's Cas. 676.

wife, a wife cannot commit larceny by taking and carrying away her husband's property;[68] and the rule is not changed by the fact that she has committed adultery, for this does not destroy the relation of husband and wife.[69] Nor can a husband commit larceny in taking and carrying away separate property of his wife.[70]

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[68] 1 Hale, P. C. 513; 1 Hawk. P. C. c. 33, § 19; 2 East, P. C. 558; Reg. v. Tollett, Car. & M. 112, Beale's Cas. 533; Reg. v. Kenny, 2 Q. B. Div. 307, 13 Cox, C. C. 397; Rex v. Willis, 1 Mood. C. C. 375; Reg. v. Featherstone, Dears. C. C. 369, 6 Cox, C. C. 376; State v. Banks, 48 Ind. 197; Lamphier v. State, 70 Ind. 317, 324.

"The wife cannot commit felony of the goods of her husband, for they are one person in law." 1 Hale, P. C. 513.

According to Hawkins, the reason for this doctrine is "because a husband and wife are considered as one person in law, and the husband, by endowing the wife at the marriage with all his worldly goods, gives her a kind of interest in them." 1 Hawk. P. C. c. 33, § 19.

[69] Reg. v. Kenny, supra. There is dictum to the contrary in Reg. v. Featherstone, supra.

[70] 2 Bish. New Crim. Law. § 872 (2); Thomas v. Thomas, 51 Ill. 162.

It has been held in Illinois that the married woman's act has not so far changed the relation of husband and wife as to render it possible for

Third Persons Aiding Wife or Taking with Her Consent.—Because of this principle, it has been held in some of the cases that a third person is not guilty of larceny in aiding a wife to take and carry away her husband's property, whatever his intent may be,[71] nor, according to some of the authorities, by himself taking and carrying away the husband's property with the wife's consent, or when it is delivered to him by her,[72] unless he is living in adultery with the wife, or is eloping with her with intent to do so, in which case it has been held that he is guilty.[73]

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a man to steal his wife's separate property. Thomas v. Thomas, supra.

[71] Reg. v. Avery, Bell, C. C. 150, 8 Cox, C. C. 184; Lamphier v. State, 70 Ind. 317, 324.

[72] 1 Hale, P. C. 514; 2 East, P. C. 558; 1 Hawk. P. C. c. 33, § 19; Rex v. Harrison, 1 Leach, C. C. 47, 2 East, P. C. 559; People v. Swalm, 80 Cal. 46.

[73] Reg. v. Tollett, Car. & M. 112, Beale's Cas. 533; Reg. v. Flatman, 14 Cox, C. C. 396; Reg. v. Harrison, 12 Cox, C. C. 19; Reg. v. Mutters, Leigh & C. 511, 10 Cox, C. C. 50; Reg. v. Thompson, 1 Den. C. C. 549, 4 Cox, C. C. 191; Reg. v. Featherstone, Dears. C. C. 369, 6 Cox, C. C. 376; Lamphier v. State, 70 Ind. 317, 325. The adulterer, however, must participate in the taking and carrying away of the property. Reg. v. Taylor, 12

The true doctrine, however, on this point, is that the liability of a man who takes and carries away another's property with the consent of the owner's wife, or when it is delivered to him by her, or who aids her in doing so, does not depend upon the fact that he has committed, or intends to commit, adultery with her, but upon whether the circumstances are such that the husband's consent to the taking may be presumed, and that, if he knows that the husband does not assent, he may be guilty of larceny, though he has not committed adultery with the wife, and does not intend to do so.[74] If he has committed adultery with her, or is eloping with her with intent to do so, he is guilty because

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Cox, C. C. 627; Reg. v. Rosenberg, 1 Car. & K. 233, 1 Cox, C. C. 21.

It has been held that an adulterer who takes possession of none of the husband's goods except the wearing apparel of the wife is not guilty of larceny. Reg. v. Fitch, Dears. & B. 187, 7 Cox, C. C. 269, 3 Jur. (N. S.) 524. And see Lamphier v. State, 70 Ind. 317, 325. Reg. v. Tollett, Car. & M. 112, Beale's Cas. 533, is to the contrary.

[74] Rex v. Tolfree, 1 Mood. C. C. 243; Reg. v. Berry, Bell, C. C. 95, 8 Cox, C. C. 117, 5 Jur. (N. S.) 228; People v. Cole, 43 N. Y. 508; People v. Schuyler, 6 Cow. (N. Y.) 572.

the assent of the husband under such circumstances cannot be presumed.[75]

(C) The Taking in Larceny.

314. Manner of Taking Possession.—To constitute larceny the property must be taken;[76] but, except as hereafter stated, it need not be taken in any particular manner or by any particular means. The taking may be—

1. **By the hands of the thief.**
2. **By means of an inanimate agency.**
3. **By means of an innocent human agent.**
4. **It need not be secretly.**
5. **It must not be from the person by violence or putting in fear, for this is robbery.**

The taking in larceny is generally by the hand of the thief, so that he acquires actual possession of the property. But it need not be so. A man may take constructive possession, so as to be guilty of larceny, by employing some inanimate agency. For example, he may steal gas from a gas company by fraudulently attaching a pipe to the pipes of the company, and thus drawing the gas

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[75] Reg. v. Berry, Bell, C. C. 95, 8 Cox, C. C. 117, 5 Jur. (N. S.) 228; People v. Schuyler, 6 Cow. (N. Y.) 572.

[76] An indictment for larceny always uses this word. It charges that the accused "did feloniously take, steal, and carry away" the property.

into his house and consuming it, without its passing through the meter;[77] or he may steal a hog by dropping corn along the ground, and thereby enticing it from the premises of the owner into his own inclosure.[78]

The taking may also be by the hand of an innocent human agent, as an insane person, or a child of tender years, or a person who is ignorant of the facts.[79] Thus, a man may steal a trunk by fraudulently changing the baggage checks at a railroad station, and thereby causing the trunk to be removed by the employes of the railroad company from the possession of the true owner, and put into

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[77] Reg. v. White, 3 Car. & K. 363, Dears. C. C. 203, 6 Cox, C. C. 213, Beale's Cas. 506; Com. v. Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706, Beale's Cas. 501. And see the other cases cited ante, § 306.

A person may steal property from a slot machine by dropping into the slot a piece of metal other than money. Reg. v. Hands, 16 Cox, C. C. 188, Beale's Cas. 614.

[78] Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67, Beale's Cas. 511. And see State v. Wisdom, 8 Port. (Ala.) 511.

[79] 3 Chit. Crim. Law, 925; Rex v. Pitman, 2 Car. & P. 423; Com. v. Barry, 125 Mass. 390, Beale's Cas. 508.

his own possession. It has been held in such a case that the larceny is complete as soon as there is the least removal of the trunk by the company.[80] A person is also guilty of larceny if, intending to steal property, he fraudulently takes out a writ of replevin or other legal process, upon a false affidavit, and without color of title, and thereby obtains possession.[81]

Stealth and Secrecy not Necessary.—Property is generally stolen secretly, but this is not at all necessary. If it is taken openly, this fact may have great weight in showing that there was no felonious intent; but, if it appears that there was in fact a felonious intent, an open taking is as much larceny as a secret taking.[82]

Violence or Putting in Fear.—The property must not be taken from the person of the owner by violence or by putting in fear, for in such a case the offense is robbery.[83]

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[80] Com. v Barry, supra.

[81] 1 Hale, P. C. 507; 1 Hawk. P. C. c. 33, § 12; Rex v. Chissers, T. Raym. 275, Beale's Cas. 515.

[82] See Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699.

[83] Long v. State, 12 Ga. 293, 318. See post, § 370, et seq.

... taken—

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   or constructive, and
2. Without his consent.

At common law, it is well settled
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[84] Reg. v. Smith, 2 Den. C. C. 449, 5 Co
533. And see Rex v. Raven, J. Kelyng, 24,
Cas. 631, and other cases more specifical
in the notes following.

[85] Pyland v. State, 4 Sneed (Tenn.) 3
shall use the word

possession of goods cannot commit a trespass in converting them to his own use, however fraudulent his intent may be, and therefore he cannot commit larceny in doing so. Nor can trespass or larceny be committed by taking goods with the free consent of the owner to part with his property therein, if the taking does not go beyond the consent. These principles will be applied in the sections following.

316. Conversion by Persons Having Lawful Possession.

(*a*) *In General.*—Since a trespass cannot be committed unless the property is taken from the actual or constructive possession of the owner, and without his consent, it follows that one who has lawfully acquired the possession of property with the owner's consent, and without a felonious intent or fraud, does not commit larceny by afterwards fraudulently converting it to his own use. There is no larceny when he acquires possession, for there is then neither a felonious intent, which is an essential element of larceny,[86] nor a trespass, which is also essential; and there is no larceny when he converts the

[86] Post, § 326.

property, for there is then no trespass. It may therefore be laid down as a general rule that one who lawfully takes possession of property by the direction or with the consent of the owner cannot commit larceny by afterwards converting it to his own use, provided he has done nothing to terminate his right to possession.[87] We are speaking here of *possession,* as distinguished from the bare custody. As we shall presently see, a man may part with the custody of his goods and retain the constructive possession, and in such a case a different rule applies.

(*b*) *Conversion by Bailees.*—This principle applies in all cases of bailment. A bailee cannot be guilty of larceny at common

[87] Rex v. Raven, Kelyng. 24, Beale's Cas. 631; Leigh's Case, 2 East, P. C. 694, Beale's Cas. 632; Rex v. Banks, Russ. & R. 441, Beale's Cas. 632; Reg. v. Thristle, 3 Cox, C. C. 573, Beale's Cas. 633; Reg. v. Pratt, 6 Cox, C. C. 373, Beale's Cas. 635; Reg. v. Reynolds, 2 Cox, C. C. 170; Reg. v. Hey, 3 Cox, C. C. 583; State v. England, 8 Jones (N. C.) 399, 80 Am. Dec. 334; State v. Fann, 65 N. C. 317; Hill v. State, 57 Wis. 377; Abrams v. People, 6 Hun (N. Y.) 491; Watson v. State, 70 Ala. 13; People v. Smith, 23 Cal. 280; and cases cited in the notes following. See, also, Murphy v. People, 104 Ill. 528.

law in fraudulently converting the property to his own use, if he had no fraudulent intent when he acquired possession, and has done nothing before the conversion to terminate the bailment, for, as his possession is lawful, there is no trespass.[88] Thus, one who hires or borrows a horse or other property without any fraudulent intent does not commit larceny in appropriating it to his own use during the continuance of the bailment.[89] The same is true of a watchmaker or other mechanic who obtains possession of property for the purpose of repairing it, etc., and afterwards converts it to his own use,[90] and of a carrier, pledgee, warehouseman, or any other bailee.[91]

(*c*) *Possession Obtained with Felonious Intent.*—This rule does not apply in any

[88] See the cases above cited.

[89] Rex v. Raven, J. Kelyng, 24, Beale's Cas. 631; Rex v. Banks, Russ. & R. 441, Beale's Cas. 632; Rex v. Meeres, 1 Show. 50; Watson v. State, 70 Ala. 13; People v. Smith, 23 Cal. 280. And see Rex v. Pear, 2 East, P. C. 685, Beale's Cas. 648.

[90] Reg. v. Thristle, 3 Cox, C. C. 573, Beale's Cas. 633.

Where a man received materials to be made up into coats and returned, and, after making the

case if a felonious intent existed at the time the property was obtained. If a person obtains the possession of property by delivery from the owner with fraudulent intent, existing at the time, of converting it to his own use, the owner intending to part with the possession only, he is guilty of larceny.[92] By

coats, sold them, and converted the proceeds, it was held that he was not guilty of larceny unless he intended to steal at the time he received the materials. Abrams v. People, 6 Hun (N. Y.) 491.

[91] Leigh's Case, 2 East, P. C. 694, Beale's Cas. 632; State v. England, 8 Jones (N. C.) 399, 80 Am. Dec. 334; State v. Fann, 65 N. C. 317.

[92] Rex v. Pear, 2 East, P. C. 685, Beale's Cas. 648; Reg. v. Bunce, 1 Fost. & F. 523, Beale's Cas. 651; Rex v. Moore, 1 Leach, C. C. 314, Beale's Cas. 658; Rex v. Sharpless, 1 Leach, C. C. 92, Beale's Cas. 611; Leigh's Case, 2 East, P. C. 694, Beale's Cas. 632; Reg. v. Buckmaster, 16 Cox, C. C. 339, Beale's Cas. 663; State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, Beale's Cas. 593; Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474, Beale's Cas. 653; State v. Gorman, 2 Nott & McC. (S. C.) 90, 10 Am. Dec. 576; People v. Smith, 23 Cal. 280; State v. Lindenthall, 5 Rich. (S. C.) 237, 57 Am. Dec. 743; State v. Humphrey, 32 Vt. 569, 78 Am. Dec. 605; U. S. v. Rodgers, 1 Mackey (D. C.) 419; State v. Woodruff, 47 Kan. 151; Justices v. People, 90 N. Y. 12; Soltau v. Gerdau, 119 N. Y. 380; State v. MacRae, 111 N. C. 665; Starkie v. Com.,

reason of his fraudulent intent his taking of the property is wrongful, and a trespass, and there is therefore a concurrence of trespass and felonious intent.

This principle applies to a borrowing or deposit of money, if the same money is to be returned, so that the borrower or depositary obtains merely the *possession,* and not the *property.*[93]

7 Leigh (Va.) 752. Compare Felter v. State, 9 Yerg. (Tenn.) 397.

In State v. Lindenthall, supra, it was held that larceny was committed by one who obtained possession of goods under pretense of taking them to another for examination, and possible purchase, but with real intent to steal them, and who afterwards converted them to his own use.

[93] Rex v. Moore, 1 Leach, C. C. 314; Reg. v. Bunce, 1 Fost. & F. 523; Stinson v. People, 43 Ill. 397; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123.

In Loomis v. People, supra, the defendant took the prosecutor into a saloon, and began to shake dice with a confederate. After apparently winning once, he induced the prosecutor to lend him $90, saying that he was sure to win, and would return the money. He lost the money to his confederate, and they left the saloon. It was held that this was larceny, as the prosecutor parted with the possession merely, and not with the right of property.

Some of the courts have applied the principle to cases in which a person hands another money to go out and get changed, or to purchase property, holding that in such a case the latter is a bailee intrusted with the possession, and that, if he fraudulently intends, at the time of receiving the money, to convert it to his own use, and does so, he is guilty of larceny.[94]

(*d*) *Possession Obtained by Fraud, but Without Felonious Intent.*—If a bailee is guilty of fraud in obtaining the property, he is guilty of trespass, in contemplation of law, though his intent may not then be felonious; and this trespass continues so long as he has possession. It follows that, if he afterwards forms and carries out a felonious intent, he is guilty of larceny.[95]

(*e*) *Termination of Right to Possession before Conversion*—(*1*) *In General.*—The rule that a bailee who has lawfully acquired possession cannot commit larceny by a sub-

[94] Com. v. Barry, 124 Mass. 325; Justices v. People, 90 N. Y. 12, 43 Am. Rep. 135 (repudiating Reg. v. Thomas, 9 Car. & P. 741).

[95] State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, Beale's Cas. 593.

sequent conversion applies only when the property is converted during the bailment. If the bailment terminates for any reason, the possession vests constructively in the owner, and an appropriation after that time involves a trespass, and may be larceny. Thus, an employe in a store, if he be regarded as a bailee of the goods during business hours, and not a mere servant having the bare custody, is guilty of larceny if he enters the store after business hours, and carries away the goods *animo furandi*.[96] The same principle has been applied to a bank teller going into the bank and taking money from the vault after business hours.[97]

(*2*) *Termination of Right to Possession by Act of Bailee.*—If a bailee, after obtain-

[96] Com. v. Davis, 104 Mass. 548.

[97] Com. v. Barry, 116 Mass. 1.

While the cases cited in this and the preceding note may be referred to as illustrating the principle stated in the text, they were not decided on correct grounds, for they were not cases of bailment at all. A mere clerk in a store or a teller in a bank is a mere servant, as he has the mere custody, not the possession, of the goods or money intrusted to him, and an appropriation by him, even during business hours, would be larceny. Post, § 317.

ing possession without felonious intent or fraud, does any act which will have the effect in law of terminating his right to possession, and after this feloniously converts the goods to his own use, he is guilty of larceny, for after the termination of the bailment he no longer has any special property in the goods or lawful possession, but stands in the same position as a servant having the mere charge or custody of them, [98] the legal possession being in the owner.[99] Thus, if a man hires or borrows a horse to ride to A., and rides to B., or if he hires or borrows a horse for one day and wrongfully keeps it for two, he thereby terminates the bailment; and if he forms and carries out, at B. or on the road to B., or on the second day, as the case may be, a felonious intent to convert the property to his own use, he is guilty of larceny.[100]

(*3*) *Breaking Bulk.*—And on the same

[98] Post, § 317.

[99] Carrier's Case, Year Book 13 Edw. IV. 9, pl. 5; Reg. v. Poyser, 2 Den. C. C. 233, Beale's Cas. 643; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Com. v. James, 1 Pick. (Mass.) 375, Beale's Cas. 645.

[100] Tunnard's Case, 1 Leach, C. C. 214, note, Beale's Cas. 640; Reg. v. Haigh, 7 Cox, C. C. 403.

principle, if a carrier or other bailee of goods breaks bulk, as where he opens a box or trunk and takes goods or money therefrom with felonious intent, he is guilty of larceny.[101]

(*f*) *Delivery of Possession by Mistake.*— The rules we have just been considering ap-

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[101] Carrier's Case, Year Book 13 Edw. IV. 9, pl. 5, Beale's Cas. 638; Rex v. Brazier, Russ. & R. 337; Rex v. Howell, 7 Car. & P. 325; State v. Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Robinson v. State, 1 Coldw. (Tenn.) 120, 78 Am. Dec. 487; Nichols v. People, 17 N. Y. 114.

In Robinson v. State, supra, a man was intrusted with a closed trunk to keep for another, and he opened it, and took money from it. It was held that he was guilty of larceny, though it would have been otherwise if he had sold the trunk without opening it, and appropriated the proceeds. See, also, State v. England, 8 Jones (N. C.) 399, 80 Am. Dec. 334.

It has been held that if a carrier or other bailee, intrusted with a number of separate packages or articles, converts an entire package or article to his own use, he is not guilty of larceny, on the ground that there is no breaking of bulk, so as to terminate the bailment before the conversion. Rex v. Madox, Russ. & R. 92, Beale's Cas. 641. There are decisions, however, to the contrary. Rex v. Howell, 7 Car. & P. 325; Com. v. Brown,

...s he obtains possession. If prope
cided for one person is delivered to
by mistake, he acquires the possessio
only the possession. If he acquires
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he property, *animo furandi*, on discov
he mistake, is not larceny, but he is
of larceny if he knows of the mistake
ie receives the property, and takes it

Mass. 580; Nichols v. People, 17 N. Y. 114
ny rate, such conversion terminates the bai
nd it is larceny to afterwards convert c
he other packages or articles. The rule i
lown in an English case, that if a bailee co
o his own use some of the goods intrusted t
nd afterwards converts the remainder, he
nits larceny, as the first conversion term
he bailment. Reg. v. Poyser, 2 Den. C. C
Beale's Cas. 643.

If a miller, or the proprietor of a grain ele
s given grain to grind or to keep and retur
ie separates a part for his own use, and
vards converts it, he is guilty of larceny. C
ames, 1 Pick. (Mass.) 375, Beale's Cas. 645

animo furandi.[102] The same is true when a person, in paying or lending money to another, gives him by mistake more money than is intended.[103] There are some decisions in conflict with this rule, but they cannot be sustained.[104]

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out of the bag, and disposes of it, he is guilty of larceny, the same as if he took out only a part. Rex v. Brazier, Russ. & R. 337.

And a cabinet maker who is intrusted with a bureau or desk to repair commits larceny if he opens a secret drawer, and takes money therefrom. Cartwright v. Green, 8 Ves. 405.

[102] Rex v. Mucklow, 1 Mood. C. C. 160, Beale's Cas. 547; Reg. v. Little, 10 Cox, C. C. 559; Reg. v. Flowers, 16 Cox, C. C. 33, Beale's Cas. 574.

[103] Reg. v. Middleton, L. R. 2 C. C. 38, Beale's Cas. 617; Reg. v. Flowers, 16 Cox, C. C. 33, Beale's Cas. 574; Wolfstein v. People, 6 Hun (N. Y.) 121, Beale's Cas. 629.

[104] In several cases, for example, it has been held that, when money or property is delivered to a person by mistake, the taking is not complete, and he does not acquire possession, until he discovers the mistake, and that he is guilty of larceny if he then forms and carries out an intent to appropriate the property or money to his own use. Reg. v. Ashwell, 16 Cox, C. C. 1, Beale's Cas. 566; State v. Ducker, 8 Or. 394. These decisions, however, are contrary to the well-settled principles shown in the preceding sections, and

317. Conversion by Persons Having the Bare Custody.

(*a*) *In General.*—There is a well-settled distinction in law between the possession of goods and the mere charge or custody, and this distinction plays an important part in the law of larceny. The owner of goods may deliver them to another in such a manner, or under such circumstances, as to give the other the bare custody, without changing the possession in the eye of the law. The possession in such a case remains constructively in the owner, and, if the person having the custody converts the goods to his own use with felonious intent, he takes them from the constructive possession of the owner, and commits a trespass and larceny. And it can make no difference, in such a case, when the felonious intent was first formed.[105]

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are opposed to the weight of authority. See Reg. v. Flowers, 16 Cox, C. C. 33, Beale's Cas. 574.

[105] Anon., Liber Ass., 137, pl. 39, Beale's Cas. 514; Anon., J. Kelyng, 35, Beale's Cas. 515; Rex v. Chissers, T. Raym. 275, Beale's Cas. 515; Reg. v. Slowly, 12 Cox, C. C. 269, Beale's Cas. 516; Rex v. Bass, 1 Leach, C. C. 251, Beale's Cas. 531; Crocheron v. State, 86 Ala. 64; and other cases cited in the notes following.

(*b*) *Larceny by Servants*— (1) *Delivery by Master to Servant as Such.*—Illustrations of this distinction generally arise in the case of servants. When a master delivers goods to his servant to be used or worked by him in the master's business, or to be taken care of for him, he does not part with the possession. The servant has the bare custody or charge, and the possession remains constructively in the master. It follows that, if the servant fraudulently converts the goods to his own use, he takes them from the constructive possession of the master, and is guilty of a trespass and larceny; and, unlike in a case of bailment, it can make no difference when the felonious intent was first conceived. It is well settled, therefore, that it is larceny for a butler to fraudulently appropriate to his own use his master's plate, or a farm hand or hostler his master's horses, or a mere clerk in a store or office his master's goods or money, of which he has the bare custody, no matter at what time his intent to do so is first formed.[106] The same principle

[106] 1 Hale, P. C. 506; Anon., J. Kelyng, 35, Beale's Cas. 515; Robinson's Case, 2 East, P. C. 565; Rex v. Harvey, 9 Car. & P. 353; Rex v. Bass,

applies when a master delivers goods or money to his servant to be used in the course of his employment, though they are to be consumed in such use, or parted with by the servant for the master, as where money is delivered to a servant by the master to buy

1 Leach, C. C. 251, Beale's Cas. 531; Rex v. Lavender, 2 East, P. C. 566, Beale's Cas. 532; State v. Self, 1 Bay (S. C.) 242; State v. Schingen, 20 Wis. 74; People v. Wood, 2 Park. Cr. R. (N. Y.) 22; U. S. v. Clew, 4 Wash. C. C. 700, Fed. Cas. No. 14,819; State v. Jarvis, 63 N. C. 556; Crocheron v. State, 86 Ala. 64; Oxford v. State, 33 Ala. 416; Powell v. State, 34 Ark. 693; Marcus v. State, 26 Ind. 101; Gill v. Bright, 6 T. B. Mon. (Ky.) 130; Jenkins v. State, 62 Wis. 49.

For a time in England there was doubt and a conflict of opinion on this question. See Year Book 3 Hen. VII. 12, pl. 9, Beale's Cas. 523; Year Book 21 Hen. VII. 14, pl. 21, Beale's Cas. 524. But the law was settled in accordance with the text by the statute of 21 Hen. VIII. c. 7. This statute has been said to be merely declaratory of the common law. Even if it be not so regarded, it is old enough, and sufficiently applicable to the conditions existing in the United States, to be regarded as a part of our common law. See Com. v. Ryan, 155 Mass. 523.

In Indiana, by statute, such conversion by a servant is embezzlement, and not larceny. Jones v. State, 59 Ind. 229; State v. Wings, 89 Ind. 204.

goods or get changed, or property is delivered to him to be sold or to be delivered to a third person, or a check is delivered to him to get cashed. In such cases the servant, until he has carried out the master's instructions, has the bare custody.[107]

(*2*) *Delivery by Master to Servant as Bailee.*—Property may be delivered by a master to his servant under such circumstances as to give the servant the possession, as distinguished from the bare custody, and so make him a bailee, so far as the law of larceny is concerned. If he receives the property honestly, and without any intent to convert it to his own use, his subsequent change of intent and appropriation of the property, while the bailment continues, cannot constitute larceny, but if his intent is felonious when he receives it, or if he does anything to terminate the bailment, and change his possession into a bare custody,

[107] Rex v. Bass, 1 Leach, C. C. 251, Beale's Cas. 531; Rex v. Lavender, 2 East, P. C. 566, Beale's Cas. 532; State v. Schingen, 20 Wis. 74. Rex v. Watson, 2 East. P. C. 562, Beale's Cas. 532, to the contrary, is clearly erroneous. See Rex v. Lavender, supra.

and then converts the property, he is guilty of larceny.[108] Such a case arises when property is delivered by a master to his servant, not as such, and for the purpose of the master, but for the purposes of the servant, as where a horse is hired or loaned to him for use in his own business or for a pleasure trip.[109] There are some cases in which it has been held, in terms or in effect, that if a master delivers money to his servant to be expended by him for goods, or to be paid over to a third person, or to get changed, and not to be returned, the servant acquires the possession as bailee, and not merely the custody, and that he is not guilty of larceny in fraudulently converting it to his own use, unless he intended to do so when he received it, or unless he has previously done something to determine his possession and revest

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[108] Ante, § 316.

[109] State v. Fann, 65 N. C. 317.

A person employed merely as a field hand on a farm, working by the day, week or month, has no charge of his master's money, and, if his master intrusts him with money to keep for him, he receives it as bailee, and not as servant. State v. Fann, 65 N. C. 317.

it constructively in the master.[110] This doctrine has been repudiated, however, both in this country and in England, and it may be regarded as settled that the servant has the bare custody only, and commits larceny in appropriating the property, no matter when he first conceived the felonious intent.[111] The same is true where goods are delivered to a servant by his master to be delivered to a third person.[112]

(*3*) *Delivery by Third Person to Servant.* —When goods are delivered by a third person to a servant for his master, and the servant afterwards fraudulently appropriates them to his own use, whether he is guilty of larceny, assuming the existence of the other elements of the offense than trespass, depends upon whether, before the appropriation, the goods had come into the constructive possession of the master, so as to render the servant a mere custodian. If the servant puts the goods in the place where it is his

[110] See Year Book 21 Hen. VII. 14, pl. 21; Beale's Cas. 524; Rex v. Watson, 2 East, P. C. 562.

[111] Rex v. Lavender, 2 East, P. C. 566, Beale's Cas. 532.

[112] Rex v. Bass, 1 Leach, C. C. 251, Beale's Cas. 531.

duty as servant to put them for the master, intending to put them there for the master, they are from that moment in the master's constructive possession, though he has never had actual possession, and a subsequent taking of them by the servant with felonious intent is larceny.[113] But if he converts the goods before he has put them in the place where his duty as servant requires him to put them for the master, he does not take them from the constructive possession of the master, and is not guilty of a trespass, nor larceny.[114]

Thus, if a master sends his servant with a

[113] Reg. v. Reed, 6 Cox, C. C. 284, Beale's Cas. 536; Reg. v. Norval, 1 Cox, C. C. 95, Beale's Cas. 535; Waite's Case, 2 East, P. C. 570, 571, 1 Leach, C. C. 28, 35, note; Bazeley's Case, 2 East, P. C. 571, 574, 2 Leach, C. C. 835, 843, note, Beale's Cas. 525; Reg. v. Wright, Dears. & B. C. C. 431, 441; Reg. v. Masters, 3 Cox, C. C. 178.

[114] Dyer, 5a; Beale's Cas. 524; Bazeley's Case, 2 East, P. C. 571, 574, 2 Leach, C. C. 835, 843, note, Beale's Cas. 525; Bull's Case, 2 East, P. C. 572, 2 Leach, C. C. 841, 843, note; Rex v. Sullens, 1 Mood. C. C. 129; Rex v. Headge, Russ. & R. 160, Beale's Cas. 706; Com. v. King, 9 Cush. (Mass.) 284; Com. v. Ryan, 155 Mass. 523, Beale's Cas. 543.

wagon after goods, to be delivered by a third person, and the servant puts them into the wagon intending to carry them to the master, they are then in the constructive possession of the master, and a subsequent conversion by the servant, *animo furandi,* is larceny; but if he receives the goods into his hands, and converts them before putting them into the wagon, it is not larceny.[115] So, when a servant receives money in payment for goods sold for his master, and puts it at once into his pocket, *animo furandi,* he is not guilty of larceny; but it is otherwise if he puts the money into his master's safe or money drawer, intending to do so for the master, and afterwards takes it out and converts it.[116]

If a servant is given money or property by the master to be delivered to a third person, as property to sell for him, or money to get changed or to buy goods, or a check to get cashed, he has, as we have seen, the mere custody of the property, money, or

[115] Reg. v. Reed, 6 Cox, C. C. 284, Beale's Cas. 536; Reg. v. Norval, 1 Cox, C. C. 95, Beale's Cas. 535.

[116] Bull's Case, 2 East, P. C. 572, 2 Leach, C. C. 841, 843, note.

check, and if he converts it he is guilty of larceny.[117] This is not necessarily true, however, of the proceeds of the property or check, or the change for the money. Being delivered by a third person for the master, they are not in his constructive possession until the servant has so deposited them as to become a mere custodian under the rules above stated, and, if he converts them before then, it is not larceny.[118]

The mere physical presence of the money or property in the place where it is the servant's duty to put it is not conclusive of the question whether he has ceased to have the possession and has become a mere custodian for the master. His intent in depositing it must also be considered. If he intended to put it there for the master, and in discharge of his duty as servant, the constructive possession is afterwards in the master. But if he makes up his mind not to turn it over to

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[117] Ante, § 317b (2).

[118] Rex v. Sullens, 1 Mood. C. C. 129; Rex v. Winnall, 5 Cox, C. C. 326; Rex v. Hartley, Russ. & R. 139; Reg. v. Keena, L. R. 1 C. C. 113, 11 Cox, C. C. 123; Rex v. Gale, 13 Cox, C. C. 340; State v. Foster, 37 Iowa, 404; Johnson v. Com., 5 Bush. (Ky.) 430; Com. v. King, 9 Cush. (Mass.) 284.

the master, but to appropriate it to his own use, and puts it even in the proper place of deposit only temporarily, and with the intention of taking it out again at a more favorable opportunity, he does not surrender the possession, and when he afterwards converts it to his own use he does not commit larceny.[119]

(*c*) *Delivery of Bare Custody to Others than Servants.*—The distinction between parting with the possession and parting with the bare custody is not limited to the case of goods in the hands of a servant, but applies in many other cases. It applies, for example, to the bed linen, silver, etc., of an innkeeper, or of a private person in the hands of a guest. The guest has the bare custody, and commits a trespass and larceny if he feloniously converts the property to his own use.[120] So, if a person delivers goods or money to another merely to be examined or dealt with in some way in his presence, and then returned, and not with intent to vest

[119] **Com. v. Ryan, 155 Mass. 523, Beale's Cas. 543.**

[120] **1 Hale, P. C. 506; Anon., Liber Ass. 137, pl. 39, Beale's Cas. 514; Com. v. Lannan, 153 Mass. 287, 25 Am. St. Rep. 629, Beale's Cas. 521.**

any right of possession in the other, the other has the bare custody, and may be guilty of larceny in converting the goods to his own use. And it can make no difference that his intention was honest when he received the goods or money into his hands.[121] Such cases arise when a merchant hands a customer goods to examine with a view to purchasing, or to take upon paying for them, and he feloniously carries them away;[122] where money is handed to a person with the understanding that he is to take out a certain amount as a loan or in payment for goods, and return the change, and he keeps the whole amount;[123] where a person requests change for a bill, and, on receiving the

[121] It was said in Com. v. O'Malley, 97 Mass. 584; Beale's Cas. 518, that "If the owner puts his property into the hands of another, to use it or do some act in relation to it, in his presence, he does not part with the possession, and the conversion of it, animo furandi, is larceny." See Rex v. Sharpless, 1 Leach, C. C. 92, Beale's Cas. 611.

[122] Rex v. Chissers, T. Raym. 275, Beale's Cas. 515; Reg. v. Slowly, 12 Cox, C. C. 269, Beale's Cas. 516; Com. v. Wilde, 5 Gray (Mass.) 83; Rex v. Sharpless, 1 Leach, C. C. 92, Beale's Cas. 611. See post, § 318c (2).

[123] Com. v. O'Malley, 97 Mass. 584, Beale's Cas.

change, refuses to hand over the bill;[124] where the holder of a note or bond hands it to the maker or obligor, or to another, merely to examine or indorse a payment, and the other destroys it or refuses to return it.[125] Many other illustrations of this principle are to be found in the reports.[126]

518; Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435, Beale's Cas. 519.

There are some cases in which it has been held that if a person gives another, not his servant, money to go out and get changed for him, or to buy goods for him, and return the goods and change, and the other, having received the money without felonious intent, afterwards forms such intent, and converts the money to his own use, he is not guilty of larceny. Reg. v. Thomas, 9 Car. & P. 741. The better opinion, however, is that, in such a case, the bare custody only is parted with; that the person receiving the money is pro hac vice in the position of a mere servant, and that he is therefore guilty of larceny. See Hildebrand v. People, supra.

[124] State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455. And see Reg. v. McKale, 11 Cox, C. C. 32.

[125] People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670.

[126] People v. Johnson, 91 Cal. 265; Com. v. Lannan, 153 Mass. 287, Beale's Cas. 521; Reg. v. Johnson, 5 Cox, C. C. 372; Levy v. State, 79 Ala. 259;

318. Consent of the Owner to Part with the Property.

(*a*) *In General.*—In considering the consent of the owner to part with the *possession* of his property, it was shown that ordinarily a bailee cannot be guilty of larceny if he had no felonious intent when he obtained possession, but that it is otherwise if he then had such intent.[127] These cases are to be distinguished from cases in which the owner consents to part with the *property* in the goods, as distinguished from the *possession;* that is, with the title or ownership. The rule is well settled that, if the owner's intention is to part with the right of property in goods in delivering them to another, and the delivery is absolute, and not conditional, the other cannot be guilty of larceny. And it can make no difference in such a case that the property is obtained with fraudulent intent, and by means of false pretenses. As was said in an Ohio case: "Where the owner intends to transfer, not the possession merely, but also the title to the property, al-

State v. Fenn, 41 Conn. 590; Huber v. State, 57 Ind. 341.

[127] Ante, § 316.

though induced thereto by the fraudulent pretenses of the taker, the taking and carrying away do not constitute larceny. The title vests in the taker, and he cannot be guilty of larceny. He commits no trespass. He does not take and carry away the goods of another, but the goods of himself." [128] This, as a general principle, is too well settled to admit of controversy, but there has

[128] Kellogg v. State, 26 Ohio St. 16. And see Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474, Beale's Cas. 653, where it is said: "If by trick or artifice, the owner of property is induced to part with the * * * naked possession to one who receives the property animo furandi, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but the right of property also, the offense of the party obtaining them will not be larceny, but that of obtaining goods by false pretenses." See, also, Rex v. Atkinson, 2 East, P. C. 673, Beale's Cas. 660; Reg. v. Solomons, 17 Cox, C. C. 93, Beale's Cas. 668; Reg. v. Bunce, 1 Fost. & F. 523, Beale's Cas. 651; Reg. v. Prince, L. R. 1 C. C. 150, Beale's Cas. 660; Reg. v. Williams, 7 Cox, C. C. 355; Reg. v. McKale, 11 Cox, C. C. 32; Reg. v. Twist, 12 Cox, C. C. 509; Reg v. Hollis, 15 Cox, C. C. 345; Wilson v. State, 1 Port. (Ala.) 118; Kelly v. People, 6 Hun (N. Y.) 509; Ross v. People, 5 Hill (N. Y.) 294.

been difficulty in applying the rule, and in determining whether, in a particular case, the intention was to part with the property or merely with the possession, and there is some conflict in the decisions resulting from a failure to properly draw the distinction.

The principle has been applied in numerous cases in which goods have been obtained by false pretenses. Thus, it has been held not to be larceny for a person to obtain property by falsely pretending to have been sent by another person for it,[129] or for a person to obtain property on the pretense of purchasing it, and on a promise to pay for it, which he does not intend to perform,[130] or to purchase property and pay for it with forged bills.[131] And there are many other similar cases.[132]

[129] Rex v. Adams, Russ. & R. 225.

[130] Rex v. Harvey, 1 Leach, C. C. 467.

[131] Rex v. Parkes, 2 Leach, C. C. 614. See, also, Reg. v. Bunce, 1 Fost. & F. 523, Beale's Cas. 651.

Obtaining a loan of money by fraudulently depositing spurious pieces in the form and semblance of gold coin as security is not larceny. Kelly v. People, 6 Hun (N. Y.) 509.

[132] See Rex v. Jackson, 1 Mood. C. C. 119, where a pawnbroker was induced to surrender a pledge by giving him a package falsely represented to contain property, to be held instead.

The principle applies equally to the obtaining of money by false pretenses. Thus, it has been held not to be larceny to obtain money from a bank or individual on a forged or counterfeit order or letter;[133] to make a pretense of putting three shillings into a purse and trade it for one shilling;[134] to obtain money in payment of a sham bet, by pretending that the bet was fair and has been lost.[135] So, if a man fraudulently induces another to lend him money, the other not expecting to get the same money back, but intending to part with his property therein, he is not guilty of larceny, though he may have obtained the money by false pretenses.[136]

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[133] Reg. v. Prince, L. R. 1 C. C. 150, Beale's Cas. 660; Rex v. Atkinson, 2 East, P. C. 673, Beale's Cas. 660.

[134] Reg. v. Solomons, 17 Cox, C. C. 93, Beale's Cas. 668.

[135] Rex v. Nicholson, 2 Leach, C. C. 610.

[136] Rex v. Summers, 3 Salk. 194, 2 East, P. C. 668; Rex v. Atkinson, 2 East, P. C. 673, Beale's Cas. 660; Lewer v. Com., 15 Serg. & R. (Pa.) 93; Kellogg v. State, 26 Ohio St. 16; Ennis v. State, 3 G. Greene (Iowa) 67; Welsh v. People, 17 Ill. 339; Wilson v. State, 1 Port. (Ala.) 118.

Thus, in Rex v. Atkinson, supra, it was held

(*b*) *Delivery by Servant or Agent.*— Whether or not it is larceny to obtain goods from a servant or agent of the owner, who in delivering them intends to part absolutely with the property in the goods, depends upon the extent of the servant's or agent's authority. If he has general authority to part with his master's or principal's property, his act in doing so is the master's or principal's act, and his consent the master's or principal's

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that it was not larceny to obtain money by sending a forged letter asking for a loan.

In Kellogg v. State, supra, the accused, by falsely pretending that he had a freight bill to pay, and that he did not wish to pay it in gold, which he represented that he had, induced the prosecutor to let him have $280 in currency, with which to make the payment. He promised to repay the money when he should go to the bank, where he said he had the money, and he gave the prosecutor what he falsely represented to be $280 in gold, to be held as security. He then ran off with the money. It was held, correctly, that this was not larceny, as the prosecutor intended to part with the property in the money, and not merely with the possession.

There are some cases in conflict with those cited above, but they cannot be sustained. One of these is People v. Rae, 66 Cal. 423, 56 Am. Rep. 102. In this case it appeared that the defendant,

consent, and the person so obtaining the property is not guilty of larceny if he would not have been guilty had the delivery been by

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while a passenger on a railroad train, obtained from the prosecutor, who was a fellow passenger, $160, with which to pay a pretended express charge. In order to obtain the money, he falsely represented that he would go to the baggage car and get some money, and repay the loan, handing over a bogus United States bond as security in the meantime. It was held that he was guilty of larceny, on the ground that the prosecutor did not intend "to part with his ownership of the money." It is clear, however, that this is just what he did intend, for he made a straight out and out loan of the money, with the intention of having the defendant pay it out of his own pretended indebtedness, and the defendant was therefore guilty of obtaining the money by false pretenses and not of larceny. Two of the six judges dissented, and it will be seen, on an examination of the cases cited in support of the decision,—Com. v. Barry, 124 Mass. 325, and Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123,—that neither of them sustain it. The case is not like those hereafter referred to, in which money or property is delivered conditionally, with intent that the "property" shall not pass until the condition is performed, as where money is delivered for goods to be delivered in return, or to be changed, or when goods are handed over for ready money, which is not paid. See post, § 318c (2).

the master or principal himself.[137] On the other hand, if the servant or agent in consenting to part with the property exceeds his authority, his consent is not the master's or principal's consent, and does not prevent the obtaining of the property from being larceny.[138] For this reason it has frequently been held that if a master or principal in-

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Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178, was a case of conditional delivery, and this distinguishes it from People v. Rae, supra.

[137] In Rex v. Jackson, 1 Mood. C. C. 119, a pawnbroker's servant, with general authority to transact his master's business, was induced by the false pretenses of a pledgor to surrender property which had been pledged. It was held that the servant's consent to part with the property was the same as his master's consent, and prevented the obtaining of the property from being larceny.

In Reg. v. Prince, L. R. 1 C. C. 150, Beale's Cas. 660, the obtaining of money from the cashier of a bank upon a forged order was held not to be larceny, because the consent of the cashier, who had general authority in the business, to part with the money, was the consent of the bank.

[138] Reg. v. Little, 10 Cox, C. C. 559, Beale's Cas. 657; Rex v. Small, 8 Car. & P. 46; Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551; and cases cited in the notes following.

trusts his servant or agent with goods to be delivered to a person only on payment by him of a certain price, the latter is guilty of larceny if he fraudulently and with felonious intent induces the servant or agent to deliver the goods without payment, or on payment in counterfeit money or worthless check.[139] The same is true where a servant or agent has authority to deliver goods to one person only, and is fraudulently induced to deliver them to another.[140]

(*c*) *Taking in a Way not within the Consent*—(*1*) *In General.*—In order that the owner's consent to part with his property may prevent the taking from being larceny, the consent must be as broad as the taking, for, if the taking goes beyond the consent, there is the necessary trespass.[141] It follows that, if the consent is to taking in a particular manner only, a taking in any other

[139] Rex v. Small, 8 Car. & P. 46; Rex v. Webb, 5 Cox, C. C. 154; Rex v. Robins, Dears. C. C. 418, Beale's Cas. 655; Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551.

[140] Reg. v. Little, 10 Cox, C. C. 559, Beale's Cas. 657.

[141] See Reg. v. Hands, 16 Cox, C. C. 188, Beale's Cas. 614.

manner will be larceny, if the other elements of the offense exist. Thus, it has been held that if a man puts out a slot machine, and invites the public to take goods from it by dropping in a piece of money, one who obtains the goods fraudulently by dropping in a piece of metal other than money is guilty of larceny.[142] And if a tobacconist places a box of matches on his counter, to be used only by customers in lighting their cigars, one who takes and carries away the whole box with felonious intent is guilty of a trespass and larceny.[143]

(*2*) *Conditional Delivery.*—The same principle applies where the owner of goods delivers them to another to become his, and to be carried away by him, only upon the performance by him, at the time, of some condition. If the other person carries away the goods, *animo furandi,* without performing the condition, he is guilty of a trespass and larceny, for there is no consent to such a taking. Thus, where goods are delivered to a person in a store or elsewhere, with the under-

[142] Reg. v. Hands, 16 Cox, C. C. 188, Beale's Cas. 614.

[143] Mitchum v. State, 45 Ala. 29, Beale's Cas. 616.

standing that he may take them on payment of the price, and he carries them off, *animo furandi,* without paying for them, he is guilty of larceny.[144] The rule also applies where money is delivered in payment of goods, and the other party keeps it and refuses to deliver the goods.[145] "In all such sales," said an English judge in a leading case, "the delivery of the thing sold, or of the money, the price of the thing sold, must take place before the other; i. e. the seller delivers the thing with one hand while he receives the money with the other. No matter which takes place first, the transaction is not complete until both have taken place. If the seller delivers first before the money is paid, and the buyer fraudulently runs off with the article, or if, on the other hand, the buyer pays first, and

[144] **Rex v. Chissers, T. Raym. 275, Beale's Cas. 515; Rex v. Slowly, 12 Cox, C. C. 269, Beale's Cas. 516; Rex v. Sharpless, 1 Leach, C. C. 92, Beale's Cas. 611; Shipply v. People, 86 N. Y. 375, 40 Am. Rep. 551; Wilson v. State, 1 Port. (Ala.) 118; Com. v. Wilde, 5 Gray (Mass.) 83; U. S. v. Rodgers, 1 Mackey (D. C.) 419.** See, also, **People v. Rae, 66 Cal. 423.**

[145] **Reg. v. Russett [1892] 2 Q. B. Div. 312, Beale's Cas. 671.**

the seller fraudulently runs off with the money without delivering the thing sold, it is equally larceny." [146]

On precisely the same principle, it is larceny for a man to whom a promissory note is handed, in order that he may indorse a payment of interest upon it, to carry it off, *animo furandi*,[147] or for a man to whom money is handed to be changed to run off with it or keep it, *animo furandi*, and refuse to give the change, though the intention may be that he shall keep part of it as payment for goods purchased or as a loan, for there is no consent to part with the money without receiving the change.[148] The same is true where a person requests change for a bill, and when it is handed to him keeps it and refuses

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[146] Per Kelly, C. B., in Rex v. Slowly, 12 Cox, C. C. 269, Beale's Cas. 516.

[147] People v. Call, 1 Denio (N. Y.) 120, 43 Am. Dec. 655.

[148] Rex v. Oliver, 2 Russ. Crimes, 170; Reg. v. McKale, 11 Cox, C. C. 32; Hildebrand v. People, 56 N. Y. 394, 15 Am. Rep. 435, Beale's Cas. 519; Walters v. State, 17 Tex. App. 226, 50 Am. Rep. 128; Com. v. O'Malley, 97 Mass. 584, Beale's Cas. 518.

to deliver the bill.[149] Other cases in which this principle has been applied will be found in the note below.[150]

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[149] State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455. See, also, Com. v. Barry, 124 Mass. 325.

[150] Where a person induces another to deliver money to him on the pretense of making a bet, and keeps it after pretending to have won, the bet not having been bona fide, but a mere trick, he is guilty of larceny, for the other only consents to put up the money and part with it on a bona fide bet. Reg. v. Buckmaster, 16 Cox, C. C. 339, Beale's Cas. 663; Rex v. Robson, Russ. & R. 413; Rex v. Horner, 1 Leach, C. C. 270; Miller v. Com., 78 Ky. 15, 39 Am. Rep. 194; Defrese v. State, 3 Heisk. (Tenn.) 53, 8 Am. Rep. 1; People v. Shaw, 57 Mich. 403, 58 Am. Rep. 372; U. S. v. Murphy, MacA. & M. 375, 48 Am. Rep. 754. See, also, Stinson v. People, 43 Ill. 397; Grunson v. State, 89 Ind. 533; Loomis v. People, 67 N. Y. 322.

In Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178, the facts were as follows: The prosecutor was seated in a railway train with one G., a stranger to him. One S., also a stranger to him, entered, wearing a badge, and falsely pretending to be an express agent, and told G. that he must pay some charges on his baggage. G. offered him a check. S. said he could not cash it, but asked the prosecutor to cash it, and to hold it until they reached a certain city, promising to cash it there for him. The prosecutor gave him the money, and

Time of Forming Intent to Steal.—The delivery in these cases not only does not give the party any right of ownership before performance of the condition, but, as we have already seen, it gives no legal possession or right of possession, but the bare custody only, and it can make no difference, therefore, that there was no felonious intent when the property was handed over.[151]

(*d*) *Consent under Duress.*—If the owner of goods is induced to part with them by duress, there is no consent at all in the eye of

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G. and S. immediately rushed from the train, taking both the money and the check. It was very properly held a case of larceny, on the ground that the delivery of the money was conditional upon receiving the check in return. Had the check been handed over to the prosecutor, it would have been simply a case of obtaining money under false pretenses. It is this that distinguishes the case from People v. Rae, 66 Cal. 423, referred to on a preceding page as a wrong decision. See ante, p. 714, note.

In Grunson v. State, supra, the court uses language tending to show that it might have held as it did, irrespective of the failure to hand over the check, but it based the decision squarely on this feature of the case, and all that is said beyond this is mere dictum.

[151] Ante, § 317.

the law, and the person so obtaining them, if he does so *animo furandi,* is clearly guilty of larceny, though the duress may not be sufficient to render him guilty of robbery.[152]

(*e*) *Delivery of Property by Mistake.*— When a person delivers property to another by mistake, as where he delivers to one person property intended for another, or delivers by mistake more money than he intends, he does not consent to part with the property. The other acquires the possession only, and not the title, and if he knows of the mistake when he receives the property, and receives it with a fraudulent intent to appropriate

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[152] Reg. v. MacGrath, L. R. 1 C. C. 205, 11 Cox, C. C. 347; Reg. v. Hazell, 11 Cox, C. C. 597; Reg. v. Lovell, 8 Q. B. Div. 185, Beale's Cas. 612; State v. Bryant, 74 N. C. 124.

In Reg. v. MacGrath, supra, the accused, who was acting as auctioneer at a mock auction, knocked down some cloth to a woman who, as he knew, had not bid for it. She refused to take the cloth, or to pay for it, whereupon the accused told her that she could not leave the place until she should do so. She paid the money under this duress, and because she was afraid. It was held that the accused was guilty of larceny, because the money was taken against the woman's will.

it to his own use, he is guilty of a trespass and larceny.[153]

319. Finding and Appropriation of Lost Goods.

(*a*) *In General.*—We have seen in a previous section that lost goods are the subject of larceny. It must not be supposed, however, that every appropriation of lost goods is larceny. Whether it is or not depends upon whether there is a trespass and at the same time a felonious intent. The finder of lost goods may take possession of them with a fraudulent intent to appropriate them to his own use, or he may take possession of them without a fraudulent intent and afterwards conceive and carry out such an intent. Again, he may, at the time of taking possession, know or have reasonable means of knowing who the owner is, or he may not then have such knowledge or means of knowledge. Whether he is guilty of larceny in appropriating the goods depends upon the circumstances.

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[153] **Reg. v. Middleton, L. R. 2 C. C. 38, Beale's Cas. 617; Reg. v. Little, 10 Cox, C. C. 559, Beale's Cas. 657; Wolfstein v. People, 6 Hun (N. Y.) 121, Beale's Cas. 629; ante, § 316 (f).**

The following rules are established by the weight of authority:

(*b*) *Possession Taken with Felonious Intent.*—(1) Though lost goods may have been taken possession of in the first instance with felonious intent, and not merely with intent to assume temporary control, and return them to the owner, the finder is not guilty of larceny, however morally wrong his conduct may be, if at the time of taking possession he did not know who the owner was, and had no reasonable means of knowledge. The fact that he subsequently discovered the owner, and then failed and refused to surrender the goods, does not render him guilty.[154] The reason is that there is no trespass in such a

[154] 3 Inst. 108; 1 Hale, P. C. 506; Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Beale's Cas. 551; Reg. v. Preston, 2 Den. C. C. 357, 5 Cox, C. C. 390, Beale's Cas. 557; Hunt v. Com., 13 Grat. (Va.) 757, 70 Am. Dec. 443; Tanner v. Com., 14 Grat. (Va.) 635; Bailey v. State, 52 Ind. 466, 21 Am. Rep. 182; Wolfington v. State, 53 Ind. 343; State v. Dean, 49 Iowa, 73, 31 Am. Rep. 143; Perrin v. Com., 87 Va. 554; People v. Cogdell, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; State v. Conway, 18 Mo. 321. And see Rex v. Mucklow, 1 Mood. C C. 160, Beale's Cas. 547.

case, for the possession cannot be said to have been obtained against the will of the owner, *"quia dominus rerum non apparet, ideo cujus sunt incertum est."* [155]

(2) On the other hand, where a felonious intent thus exists at the time of taking possession, it is a trespass and larceny if the finder either actually knows the owner or has reasonable means of knowing him, as where there are marks upon the property, known to him, by which the owner can be ascertained, or where there are other circumstances which reasonably suggest the ownership.[156]

(*c*) *Possession Taken without Felonious Intent.*—(3) When a felonious intent does

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[155] 3 Inst. 108; 1 Hale, P. C. 506; Hunt v. Com., 13 Grat. (Va.) 757, 70 Am. Dec. 443.

If a statute requires the finder of lost goods to advertise them, it is larceny for him to fraudulently appropriate them to his own use without advertising them. State v. Jenkins, 2 Tyler (Vt.) 377.

[156] Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Beale's Cas. 551; Reg. v. Preston, 2 Den. C. C. 357, 5 Cox, C. C. 390, Beale's Cas. 557; Reg. v. Peters, 1 Car. & K. 245; Hunt v. Com., 13 Grat. (Va.) 757, 70 Am. Dec. 443; Com. v. Titus, 116 Mass. 42, 17 Am. Rep. 138, Beale's Cas. 563; Bailey v. State, 52 Ind. 466, 21 Am. Rep. 182; State

not exist in the mind of the finder at the time of taking possession, as where he takes possession with intent to restore the property to the owner, which he may lawfully do, a subsequent change of intent and appropriation of the property cannot make him guilty

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v. Weston, 9 Conn. 526, 25 Am. Dec. 46; People v. Swan, 1 Park. Cr. R. (N. Y.) 9. And see Reg. v. Rowe, Bell, C. C. 93, Beale's Cas. 562.

"If the finder, from the circumstances of the case, must have known who was the owner, and, instead of keeping the chattel for him, means, from the first, to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass." Merry v. Green, 7 Mees. & W. 623, Beale's Cas. 548.

Thus, it has been held larceny for the purchaser of a bureau to appropriate to his own use a purse containing money, which he found in a secret drawer, Merry v. Green, 7 Mees. & W. 623, Beale's Cas. 548; for a carpenter to appropriate money found by him in a secret drawer of a bureau sent to him to be repaired, Cartwright v. Green, 2 Leach, C. C. 952, 8 Ves. 405; for a coachman to appropriate goods left in his coach by a passenger, whom he could readily have ascertained, Wynne's Case, 2 East, P. C. 664; for the purchaser of a trunk to appropriate goods put there by the seller for safe-keeping, and left there by mistake, Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790; or for a servant to appropriate a ring or

of larceny, even though, at the time of originally taking possession, he may have known, or had reasonable means of knowing, the owner. The reason is that, as the possession has been lawfully acquired, there is no trespass. It is like any other case of conversion

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other property of his mistress, dropped in the house or garden, Reg. v. Peters, 1 Car. & K. 245, and State v. Cummings, 33 Conn. 260.

If a person goes to a stall in the market, or to a shop or store, and leaves his purse or other property, the proprietors or their employes have no right to appropriate the same to their own use, without waiting a reasonable time for the owner to return for it, as the circumstances are such as to show that in all probability a customer has left it, and that he will return to claim it; and, if they take it animo furandi, they are guilty of larceny. Reg. v. West, Dears. C. C. 402, 6 Cox, C. C. 415, Beale's Cas. 561; State v. McCann, 19 Mo. 249; Lawrence v. State, 1 Humph. (Tenn.) 227; People v. McGarren, 17 Wend. (N. Y.) 460. See, also, Reg. v. Rowe, Bell, C. C. 93, Beale's Cas. 562.

In some of the cases above cited, the court said that the property was merely mislaid, and not lost, and that the rules as to the conversion of lost property did not apply. The true reason for such decisions, however, is that the property, though lost by the owner (as it certainly is, if he does not know where he has mislaid it), is found

by a bailee who has lawfully acquired possession.[157]

(*d*) *Time of Acquiring Possession.*—(4) The finder of lost property does not take possession of it, within the meaning of these

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by the person appropriating it under such circumstances as to show that the owner, whoever he may be, will probably return, and so be ascertained.

That estray cattle are not within the rule as to lost goods, see Rex v. Phillips, 2 East, P. C. 659; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507; People v. Kaatz, 3 Park. Cr. R. (N. Y.) 129; State v. Martin, 28 Mo. 530. And see Reg. v. Finlayson, 3 New South Wales Sup. Ct. 301, Beale's Cas. 565.

[157] Hunt v. Com., 13 Grat. (Va.) 757, 70 Am. Dec. 443; Tanner v. Com., 14 Grat. (Va.) 635; Ransom v. State, 22 Conn. 153; Starck v. State, 63 Ind. 285.

In Ransom v. State, supra, which was a prosecution for stealing a pocketbook and bank notes, which had been lost on the highway, the judge instructed the jury that, if the defendant, at the time he found the property, knew, or had the means of knowing, the owner, and did not restore it to him, but converted it to his own use, he was guilty of larceny. It was held that the instruction was erroneous, because, if the defendant, at the time he took possession of the property, meant to act honestly with regard to it, no subsequent felonious intention to convert it to his own use could make him guilty of larceny.

rules, merely by taking it up to look at it, but his possession dates from the time he takes possession so as to know what it is.[158]

320. Continuing Trespass.

(*a*) *In General.*—To constitute larceny, it is not only necessary that there shall be a trespass, but, as will be hereafter explained, it is also necessary that there shall be a felonious intent, and they must always concur in point of time. It is not always necessary, however, in order that there may be such a concurrence of trespass and felonious intent, that there shall be such an intent at the time the property is first taken. If a man wrongfully takes another's property without his consent, he commits a trespass, however innocent his intention may be. The trespass continues during every moment in which he holds the property without right; and, if he afterwards forms and carries out the felonious intent to steal it, there is then the concurrence of trespass and felonious intent necessary to make out the crime of larceny.[159]

(*b*) *Taking Property by Mistake.*—This

[158] Reg. v. Thurborn, 1 Den. C. C. 387, 2 Car.

doctrine applies where a person by mistake takes the property of another without his consent, the property not being lost nor delivered to him by the owner. If, after discovery of his mistake, he forms and carries out a felonious intent to steal, he is guilty of larceny. The taking by mistake in such a case is a trespass, and the trespass continues up to the time when the mistake is discovered and the property converted.[160]

These cases must be distinguished from

& K. 831, Beale's Cas. 551; Reg. v. Preston, 2 Den. C. C. 357, 5 Cox, C. C. 390, Beale's Cas. 557.

[159] Reg. v. Riley, Dears. C. C. 149, 6 Cox, C. C. 88, Beale's Cas. 591; Reg. v. Finlayson, 3 New South Wales Sup. Ct. 301, Beale's Cas. 565; State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, Beale's Cas. 593; Com. v. White, 11 Cush. (Mass.) 483; Weaver v. State, 77 Ala. 26.

[160] In Reg. v. Riley, Dears. C. C. 149, 6 Cox, C. C. 88, Beale's Cas. 591, the defendant, in driving a flock of lambs, drove with them by mistake one which belonged to another, and when he discovered his mistake he converted the lamb to his own use. This was held to be larceny on the ground that driving the lamb off without the owner's consent, though by mistake, was a trespass, which continued up to the time of the conversion. See, also, Reg. v. Finlayson, 3 New South Wales Sup. Ct. 301, Beale's Cas. 565.

cases in which the goods taken are lost goods, the owner of which is not known nor pointed out by marks on the goods, or other circumstances, for in such a case there is no trespass at all.[161] They must also be distinguished from cases in which the owner of property delivers it by mistake, and in which there is no trespass at all unless the other party knows of the mistake at the time.[162]

(*c*) *Obtaining Possession by Fraud.*—The doctrine of continuing trespass also applies where goods are delivered by the owner, if the possession is obtained through fraud, and the owner does not intend to part with the property in the goods. Though there may have been no felonious intent, or intent to steal, at the time of obtaining the possession, there has been a trespass because of the fraud in obtaining possession, and the trespass continues to the time of the conversion. According to this doctrine the felonious intent need not have existed at the time of original taking, when such taking was fraud-

[161] Ante, § 319. See the opinions in Reg. v. Riley, supra.

[162] Ante, § 316f.

ulent.[163] There are very few cases in the reports in which the doctrine of continuing trespass has been applied where possession was obtained by fraud, for the reason that in most cases the intent to steal also existed at the time the possession was obtained.[164]

(*d*) *Continuous Possession of Stolen Property.*—If a man steals property he commits a trespass, and he is guilty of a continuous trespass and asportation during every moment in which he retains possession. As was said in a Maine case: "The doctrine of the common law is that the legal possession of stolen goods continues in the owner, and

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[163] In State v. Coombs, 55 Me. 477, 92 Am. Dec. 610, Beale's Cas. 593, the defendant, without any present intention of theft, obtained possession of another's team by falsely and fraudulently pretending that he wanted to drive it to a certain place, and to be gone a specified time, when in fact he intended to go to a more distant place, and to be absent a longer time; and, while thus in possession, he converted the team to his own use with felonious intent. He was held guilty of larceny, on the ground that he committed a trespass in obtaining the horse fraudulently, and the trespass continued until he formed and carried out the intent to steal it.

[164] Ante, § 316e.

every moment's continuance of the trespass and felony amounts in legal consideration to a new caption and asportation." [165] Upon this principle, a person stealing goods in one county or state and carrying them into another is deemed guilty of larceny in any county or state where he may carry them.[166] For the same reason, if goods are stolen before a statute takes effect, and are retained in the possession of the thief until afterwards, he may be indicted and punished for larceny under the statute.[167]

(D) The Asportation in Larceny.

321. In General.—To constitute larceny there must be some asportation or carrying away of the property. But there is a sufficient asportation if the property be entirely removed from the place it occupied, and be under the dominion and control of the trespasser, though only for an instant.

322. An Asportation is Necessary.

Another essential element of larceny at common law is the asportation of the property. There must not only be a taking or

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[165] State v. Somerville, 21 Me. 14, 19. 38 Am. Dec. 248.

[166] Anon., Year Book 7 Hen. IV. 43, pl. 9, Beale's Cas. 595; 1 Hale, P. C. 507; 1 Hawk. P. C. c. 32, § 52; 2 East, P. C. 771; Com. v. Rand, 7 Metc.

caption of the property, but the property must also be to some extent carried away. As was said by the Alabama court: "There must be such a caption that the accused acquires dominion over the property, followed by such an asportation or carrying away as to supersede the possession of the owner for an appreciable period of time. Though the owner's possession is disturbed, yet the offense is not complete if the accused fails to acquire such dominion over the property as to enable him to take actual custody and control." [168]

Illustrations.—For this reason it has been held not to be larceny merely to set up a package on end, though with intent to steal it, no further control being acquired; [169] or to turn over a barrel of goods from the end to the side with such intent, when nothing further

(Mass.) 475, 41 Am. Dec. 455. For other cases, see post, § 499.

[167] State v. Somerville, 21 Me. 14, 38 Am. Dec. 248.

[168] Thompson v. State, 94 Ala. 535, 33 Am. St. Rep. 145, Beale's Cas. 513. See, also, Rex v. Farrell, 1 Leach, C. C. 322, note; Rex v. Cherry, 1 Leach, C. C. 237, note, 2 East, P. C. 556; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67, Beale's Cas.

is done towards carrying it away;[170] or to touch or disturb a pocketbook or money in another's pocket or drawer, without removing it at all from the place it occupies in the pocket or drawer;[171] or to trap an animal, or merely entice or chase or kill it, when it is not taken into the possession or control of the trespasser;[172] or to compel or induce a person to lay down or drop his money or goods, with intent to steal them, where the trespasser is apprehended or prevented, or leaves before taking them up;[173] or to attempt to snatch money from another's hand

511; Com. v. Luckis, 99 Mass. 431, 96 Am. Dec. 769.

[169] Rex v. Cherry, 1 Leach, C. C. 237, note, 2 East, P. C. 556.

[170] State v. Jones, 65 N. C. 395.

[171] Com. v. Luckis, 99 Mass. 431, 96 Am. Dec. 769.

[172] State v. Wisdom, 8 Port. (Ala.) 511; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67, Beale's Cas. 511; Wolf v. State, 41 Ala. 412; State v. Seagler, 1 Rich. (S. C.) 30, 42 Am. Dec. 404.

In Edmonds v. State, supra, it was held not to be larceny to entice a hog for 20 yards on the owner's premises by dropping corn, and then strike it with an axe, and abandon it. Compare post, § 323.

[173] Rex v. Farrell, 1 Leach, C. C. 322, note.

and knock it to the ground, without picking it up.[174] And if a man seizes and attempts to carry away property, but is prevented from doing so by reason of its being attached by a chain to the person of the owner or to the counter in a store, there is not sufficient asportation to constitute larceny, for he does not acquire entire control even for an instant.[175]

323. The Slightest Asportation Sufficient.

While, as is shown by the cases above referred to, some asportation is essential, it is not necessary that the property shall be carried to any particular distance, or that possession and control shall be retained for any particular length of time. The slightest asportation is sufficient. The trespasser must acquire complete control over the property, but the slightest entire removal of it from the place it occupies, and a temporary control of it, even for a moment, is enough. It has

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[174] **Thompson v. State, 94 Ala. 535, 33 Am. St. Rep. 145, Beale's Cas. 513.**

[175] **Wilkinson's Case, 1 Leach, C. C. 321, note, 2 East, P. C. 556.**

been said that removal to the distance of "a hair's breadth" is sufficient.[176]

Illustrations.—Thus, although to upset a barrel from the end to the side, or merely to set a package up on end, is not a sufficient asportation,[177] it has been held larceny to lift a

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[176] See Rex v. Walsh, 1 Mood. C. C. 14, Beale's Cas. 505; Eckles v. State, 20 Ohio St. 508; Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550; State v. Jones, 65 N. C. 395; State v. Craige, 89 N. C. 475; State v. Gazell, 30 Mo. 92; Gettinger v. State, 13 Neb. 308. And see the cases cited in the note following.

"The felony," said the Ohio court, "lies in the very first act of removing the property. Therefore, the least removing of the entire thing taken, with an intent to steal it, if the thief thereby, for the instant, obtain the entire and absolute possession of it, is a sufficient asportation, though the property be not removed from the premises of the owner, nor retained in the possession of the thief." Eckels v. State, supra.

"Although the whole of the article taken be not removed from the whole space which the whole article occupied before it was taken, yet, if every part thereof be removed from the space which that particular part occupied just before it was so taken, such removal is a sufficient asportation." State v. Chambers, supra.

[177] Ante, § 322.

bag from the bottom of the boot of a coach, with intent to steal it, every part of the bag being entirely removed from the place it occupied, though there was no further removal;[178] or to remove a package from one end of a wagon to the other;[179] or to lift a sword partly from the scabbard.[180]

So, while merely to touch or disturb a pocketbook or money in another's pocket or drawer is not a sufficient asportation to constitute larceny,[181] it is otherwise if the pocketbook or money be seized by the thief, and removed from the place it occupied, though he is detected and drops it before he has entirely removed it from the pocket or drawer.[182]

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[178] Rex v. Walsh, 1 Mood. C. C. 14, Beale's Cas. 505.

[179] Rex v. Coslet, 1 Leach, C. C. 236, 2 East, P. C. 556.

[180] Rex v. Walsh, 2 Russ. Crimes, 153.

[181] Ante, § 322.

[182] Rex v. Thompson, 1 Mood. C. C. 78; Eckels v. State, 20 Ohio St. 508; Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550.

In State v. Green, 81 N. C. 560, where a drawer containing money had been removed from a safe, and the money handled, it was held that there

And, while it is not larceny to entice an animal on the owner's premises with intent to steal it, if no control over it is entirely acquired,[183] it is otherwise if an animal is enticed into an inclosure of the enticer, or if it is led by him, or by an innocent third person by his direction, for any distance, however slight, even though it be not led from the owner's premises.[184] Other cases are referred to in the note below.[185]

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had been a sufficient asportation to constitute larceny.

[183] Ante, § 322.

[184] Rex v. Pitman, 2 Car. & P. 423; Wisdom's Case, 8 Port. (Ala.) 511, 519; State v. Gazell, 30 Mo. 92.

In Rex v. Pitman, supra, the accused had caused the hostler at an inn to lead another's horse from the stable, feloniously intending to mount and ride away, and it was held that the asportation was sufficient.

In State v. Gazell, supra, the accused himself led the horse for a short distance on the owner's premises, with intent to steal it, and a conviction was sustained.

[185] The asportation has been held sufficient in the following cases:

Breaking open a box of shoes on board a ship, taking out the shoes and concealing them on the vessel. Nutzel v. State, 60 Ga. 264.

Taking a lady's earring from her ear, and im-

324. Manner of Asportation.

If there is a sufficient asportation under the rules stated above, it is altogether immaterial how it is effected. The carrying away is generally by the hand of the trespasser, but it need not necessarily be so. Thus, as was shown in a previous section, an animal may be stolen by driving or enticing it away;[186] and asportation may be effected entirely by mechanical agencies, as by fraudulently connecting a private pipe with the pipes of a water or gas company, and con-

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mediately dropping and losing it in her hair. Lapier's Case, 1 Leach, C. C. 320, 2 East, P. C. 557.

Taking a watch from the owner's pocket, and drawing the chain through the button hole, though the key caught on the button of another hole. Reg. v. Simpson, Dears. C. C. 421 (a doubtful case).

Drawing liquor into a can. Reg. v. Wallis, 3 Cox, C. C. 67.

Putting into sacks grain found in a granary. State v. Hecox, 83 Mo. 531.

Removing grain from the owner's garner in a mill to the adjoining garner of the accused. State v. Craige, 89 N. C. 475, 45 Am. Rep. 698.

[186] State v. Wisdom, 8 Port. (Ala.) 511; Edmonds v. State, 70 Ala. 8, 45 Am. Rep. 67, Beale's Cas. 511; ante, §§ 314, 323.

suming or using the water or gas;[187] or it may be effected by means of an innocent human agent.[188]

325. Return of Goods.

As soon as there has been a sufficient asportation under the rules stated in the preceding sections, the larceny is complete, if there is also the requisite felonious intent; and, in the absence of statutory provision, the guilt of the trespasser cannot be affected in any way by his abandoning or returning the goods.[189]

(E) The Felonious Intent in Larceny.

326. In General.—To constitute larceny at common law there must be what is technically called a "felonious" intent, or "animus furandi," and this intent must exist both in the taking and in the carrying away. By this it is meant that there must be:

1. A fraudulent intent, and not a mistake or bona fide claim of right.

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[187] Reg. v. White, 3 Car. & K. 363, Dears. C. C. 203, 6 Cox, C. C. 213, Beale's Cas. 506; ante, § 314, note 77.

[188] Rex v. Pitman, 2 Car. & P. 423; Com. v. Barry, 125 Mass. 390, Beale's Cas. 508; ante, § 314.

[189] 2 East, P. C. 557; State v. Scott, 64 N. C. 586; ante, § 66.

2. And an intent to deprive the owner permanently of his property in the goods, or of their value or a part of their value.
3. Some of the authorities require that the taking shall be lucri causa,—that is, for the sake of gain; but by the weight of authority this is not necessary.

327. Fraudulent Intent Necessary.

All of the authorities agree that the intent must be fraudulent. As the taking in larceny involves a trespass, so the intent involves fraud.[190] If one takes another's goods by accident or mistake, he commits a trespass and is liable in a civil action, but he is not guilty of larceny.[191] Nor is a man guilty of larceny in taking another's prop-

[190] See Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; McCourt v. People, 64 N. Y. 583; Keely v. State, 14 Ind. 36; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269.

[191] Long v. State, 11 Fla. 295; Hall v. State, 34 Ga. 208; Billard v. State, 30 Tex. 367, 94 Am. Dec. 317; Donahoe v. State, 23 Tex. App. 457; Criswell v. State, 24 Tex. App. 606; People v. Devine, 95 Cal. 227; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269.

It is not larceny for a person to take property by the direction or with the consent of one who he believes to be the owner, but who is not. State v. Matthews, 20 Mo. 55. See Mead v. State, 25 Neb. 444.

erty under a *bona fide* claim of ownership or right, however unfounded the claim may be in law.[192]

328. Intent to Deprive the Owner of His Property.

(*a*) *In General.*—Even when there is a fraudulent intent, and the trespasser knows that the property belongs to another, the taking is not necessarily larceny. There must, in addition to this, be an intent to deprive the owner of his property, and to deprive him of it *permanently*.[193] It is not larceny,

[192] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; Rex v. Jackson, 1 Mood. C. C. 119; Reg. v. Wade, 11 Cox, C. C. 549; State v. Homes, 17 Mo. 379, 57 Am. Dec. 269; People v. Schultz, 71 Mich. 315; Phelps v. People, 55 Ill. 334; Baker v. State, 17 Fla. 406; State v. Leicham, 41 Wis. 565; State v. Barrackmore, 47 Iowa, 684; Ross v. Com. (Ky.) 20 S. W. 214; Winn v. State, 17 Tex. App. 284.

Of course the claim must be bona fide. See McDaniel v. State, 8 Smedes & M. (Miss.) 401, 418; People v. Long, 50 Mich. 249.

[193] Rex v. Crump, 1 Car. & P. 658, Beale's Cas. 685; Rex v. Dickinson, Russ. & R. 420, Beale's Cas. 684; Reg. v. Holloway, 2 Car. & K. 942, 1 Den. C. C. 370, 3 Cox, C. C. 241, Beale's Cas. 692; State v. South, 28 N. J. Law, 28, 75 Am. Dec. 250; State v York, 5 Harr. (Del.) 493; Witt v. State, 9 Mo. 671; Johnson v. State, 36 Tex. 375; State v. Self, 1 Bay (S. C.) 242; Keety v. State, 14 Ind. 36.

therefore, to take another's property in jest or from idle curiosity, intending to return it, though such a taking is wrongful and a trespass.[194] Nor is it larceny to take another's property with intent to use or keep it *temporarily*, and then return it or put it where it will reach the owner's possession again.[195]

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[194] Reg. v. Godfrey, 8 Car. & P. 563; Devine v. People, 20 Hun (N. Y.) 98; Johnson v. State, 36 Tex. 375.

[195] Thus, it has repeatedly been held that it is not larceny to take another's horse, when the intent is merely to ride it some distance, and then return it, or abandon it at such a place that it will return, or be recaptured by the owner. Rex v. Philipps, 2 East, P. C. 662; Rex v. Crump, 1 Car. & P. 658, Beale's Cas. 685; Dove v. State, 37 Ark. 261; State v. York, 5 Harr. (Del.) 493; Umphrey v. State, 63 Ind. 223; Johnson v. State, 36 Tex. 375; Schultz v. State, 30 Tex. App. 94; State v. Self, 1 Bay (S. C.) 242.

Many other illustrations of this principle are to be found in the reports. Thus, in Rex v. Dickinson, Russ. & R. 420, Beale's Cas. 684, it was held that a man was not guilty of larceny in taking a girl's bonnet and other articles of apparel, where he did so merely for the purpose of inducing her to come to a hay mow, so that he could have intercourse with her. There was a like decision in Cain v. State, 21 Tex. App. 662, where the accused had taken a woman's jewelry, not with intent to

These cases must be distinguished from cases in which there is no intent to return the property when it is taken. If property is taken with the felonious intent, its subsequent return to the owner, or its abandonment and recovery by him, does not make his offense any the less larceny.[196]

(*b*) *Dealing in a Way Likely to Deprive the Owner of His Property.*—Since a man is presumed to have intended the natural consequences of his acts, it may well be inferred that one who has taken another's property intended to deprive him of it permanently, if he so disposed of it or dealt with it that as a natural consequence the owner would be so deprived of it. Thus it has

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deprive her of it permanently, but to prevent her from going out to a place of amusement.

See, also, Wilson v. State, 18 Tex. App. 270, 51 Am. Rep. 309, where it was held that the accused, who had broken into a shop, and taken a brace therefrom with intent to use it to break into a house, and then leave it, which they did, were not guilty of larceny. And see State v. Gilmer, 97 N. C. 429, where it was held that to take property from an intoxicated person with intent merely to take care of it for him was not larceny.

[196] See State v. Davis, 38 N. J. Law, 176, 20 Am. Rep. 367. And see ante, § 66.

been held that if one takes another's property without his consent, and abandons it at a place from which it is not likely to be returned to the owner or recaptured by him, it may be inferred that he intended to deprive the owner of it permanently, though he may testify that he only intended to use it temporarily.[197] The presumption, of course, is one of fact, and not of law, and is subject to rebuttal.

(*c*) *Intent to Sell to Owner or to Return for Reward.*—When it is said that there must be an intent to deprive the owner permanently of his property, it is not meant that the intent must necessarily be to keep the specific property from him. It is sufficient if the intent be to deprive him of its value or a part of its value.[198] For example, it has been held larceny to take a railroad

[197] See State v. Ward, 19 Nev. 297; Reg. v. Trebilcock, 7 Cox, C. C. 408, Beale's Cas. 688; Reg. v. Hall, 3 Cox, C. C. 245, Beale's Cas. 696; and cases cited in the notes following.

[198] "When a person takes property of another with intent to deprive the owner of a portion of the property taken, or of its value, such intent is felonious, and the taking is larceny." Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

ticket with intent to use it for a journey, though by such use the railroad company gets possession of the ticket again.[199] The same is true where the intent is to sell the property back to the owner as the property of the taker or of some third person,[200] or to return it only on the payment of an expected reward.[201] Some of the decisions seem to be at variance with this doctrine, but it is supported by the great weight of authority.[202]

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[199] Reg. v. Beecham, 5 Cox, C. C. 181, Beale's Cas. 697.

[200] Reg. v. Hall, 3 Cox, C. C. 245, Beale's Cas. 696; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507. And see Reg. v. Manning, 6 Cox, C. C. 86.

[201] Reg. v. Spurgeon, 2 Cox, C. C. 102, Beale's Cas. 685; Reg. v. Peters, 1 Car. & K. 245; Reg. v. O'Donnell, 7 Cox, C. C. 337; Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507. Compare Reg. v. Gardner, 9 Cox, C. C. 253, Beale's Cas. 686.

[202] In Reg. v. Holloway, 1 Den. C. C. 370, 3 Cox, C. C. 241, 2 Car. & K. 942, Beale's Cas. 692, the accused was indicted for the larceny of some dressed skins of leather. A special verdict was returned, showing that he took the skins, not with intent to sell or dispose of them, but to bring them in and charge them as his own work, and get paid by his master for them. The skins had been dressed by another workman, and not by the accused. It was

(*d*) *Intent to Pawn.*—If a man takes another's goods with intent to pawn them, and does so, he is clearly guilty of larceny if he does not intend to redeem and return them.[203] And he is guilty even if he does intend to redeem and return them, if he does not show ability to do so, or at least a fair and reasonable expectation of ability.[204] If he shows such ability or expectation, it seems that he is not guilty.[205]

(*e*) *Intent to Apply in Payment of Debt.*—To take another's property with intent to apply it in payment of a debt due from him is larceny.[206]

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held not to be larceny. This case has been doubted and disapproved in later cases, both in England and in this country, and perhaps would not now be followed. See Reg. v. Poole, 1 Dears. & B. C. C. 347; Fort v. State, 82 Ala. 50; Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506.

[203] State v. Lindenthall, 5 Rich. (S. C.) 237, 57 Am. Dec. 743.

[204] Reg. v. Phetheon, 9 Car. & P. 552; Reg. v. Trebilcock, 7 Cox, C. C. 408, Beale's Cas. 688.

[205] Reg. v. Wright, 9 Car. & P. 554, note. But see Reg. v. Trebilcock, supra.

[206] Com. v. Stebbins, 8 Gray (Mass.) 492; Gettinger v. State, 13 Neb. 308.

329. Effect of Custom.

As we have seen in a previous section, custom cannot justify an act which, in the absence of custom, would be a crime. A person, therefore, who takes another's property without his consent, knowing that it belongs to the other, and intending to deprive him of it permanently, is guilty of larceny, notwithstanding a custom in the community to take property under similar circumstances.[207]

330. Lucri Causa.

Some of the courts have held that to constitute larceny there must be what is technically called *"lucri causa,"*—that is, expectation of gain or benefit to the thief; and that it is not enough that he fraudulently intends to deprive the owner of his property.[208] According to this view, it has been

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[207] Thus, in Lancaster v. State, 3 Cold. (Tenn.) 340, 91 Am. Dec. 288, it was held that a taking of property was none the less larceny because of a prevalent opinion in the community, and a custom based thereon, applicable to the taking in question, that a contending party in the Civil War had a right to reimburse itself for losses occasioned by the other. And see ante, § 84, and cases there cited.

[208] 2 East, P. C. 553; Reg. v. Godfrey, 8 Car. & P.

held that merely to kill an animal and throw it into a ditch, or to take a wagon and break it to pieces, merely for the purpose of injuring the owner, and not to benefit the trespasser, is not larceny, but merely malicious mischief,—a misdemeanor.[209]

This doctrine, however, is not sustained by the weight of authority. Most of the courts hold that a *lucri causa* is not necessary, but that a fraudulent intent to deprive the owner permanently of his property is all that is required.[210] Even where a *lucri causa* is regarded as necessary, there need not be expec-

563; U. S. v. Durkee, 1 McAll. 196, Fed. Cas. No. 15,009.

East defined larceny as "the fraudulent or wrongful taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." 2 East, P. C. 524.

[209] See the cases above cited.

[210] State v. Ryan, 12 Nev. 401, 28 Am. Rep. 802; State v. Wellman, 34 Minn. 221; Delk v. State, 63 Miss. 77, 60 Am. Rep. 46 (overruling McDaniel v. State, 8 Smedes & M. 401, 418); Williams v. State, 52 Ala. 411 (overruling State v. Hawkins, 8 Port. (Ala.) 461, 33 Am. Dec. 294); Dignowitty v. State,

tation of pecuniary gain. Any benefit or advantage is sufficient.[211]

331. Taking by General from Special Owner.

It has been shown in a previous section that the person having the general property in goods may be guilty of larceny in taking them from the possession of one who has a special property in them. For example, the owner of goods which have been mortgaged or pledged or taken by an officer on execution may commit larceny in taking them from the mortgagee or the officer.[212] In these as

17 Tex. 521, 67 Am. Dec. 670; Jordan v. Com., 25 Grat. (Va.) 943. There are a number of English cases to the same effect.

Thus, in Reg. v. Privett, 2 Car. & K. 114, it was held larceny for a servant to clandestinely take his master's oats, though he did so to give them to his master's horses, and though he was not answerable for the condition of the horses. See, to the same effect, Reg. v. Handley, Car. & M. 547; Rex v. Morfit, Russ. & R. 307, Beale's Cas. 683. And in Reg. v. Jones, 2 Car. & K. 236, 1 Den. C. C. 188, it was held larceny to take and burn a letter addressed to another. See, also, Rex v. Cabbage, Russ. & R. 292, Beale's Cas. 682; Wynn's Case, 1 Den. C. C. 365.

[211] See Reg. v. Jones, 2 Car. & K. 236, 1 Den. C. C. 188.

[212] Ante, § 313b.

in other cases the taking must be with felonious intent. It must be fraudulent and with intent to charge the special owner with their value.[213] It is not larceny if the goods are taken under a *bona fide* claim of right, however unfounded.[214]

332. Concurrence of Intent and Trespass and Asportation.

As we have already seen at some length, a taking of the property by a trespass and an asportation are essential ingredients of larceny. Both of these ingredients must be accompanied by the felonious intent.[215]

333. Change of Intent.

When a man has taken and carried away property with the requisite felonious intent, the larceny is complete, and his guilt attaches. In the absence of statutory provisions, the fact that he subsequently changes his mind and returns the property, or aban-

[213] Rex v. Wilkinson, Russ. & R. 470, Beale's Cas. 674; Adams v. State, 45 N. J. Law, 448, Beale's Cas. 679; Palmer v. People, 10 Wend. (N. Y.) 165; People v. Stone, 16 Cal. 369; People v. Thompson, 34 Cal. 671; People v. Long, 50 Mich. 249; People v. Schultz, 71 Mich. 315.

[214] See the cases above cited.

[215] Ante, §§ 316, 317(2), 318, 320.

dons it so that it is recovered by the owner, or pays for it, will not make him any the less guilty.[216] But, of course, the fact that the property is returned or abandoned may be considered as evidence in determining the intent with which it was taken.

(F) Grand and Petit Larceny.

334. In General. **By the statute of Westminster I. c. 15, larceny was divided into "grand" and "petit" larceny. It was made grand larceny where the value of the property exceeded twelve pence, and petit larceny where the property was of that value or less. In this country there are statutes in some states making such a distinction, but differing from the statute of Westminster and from each other with respect to value. Both grand and petit larceny were felonies under this statute, but under our statutes petit larceny is generally a misdemeanor only.**

The Distinction is Statutory.—It has been said by an eminent writer, and in some of the cases, that *at common law* larceny is divided into grand and petit larceny;[217] but this is not true if it is intended to refer to the com-

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[216] State v. Davis, 38 N. J. Law, 176, 20 Am. Rep. 367; ante, §§ 66, 325. In some states it is expressly provided by statute that the voluntary return of stolen property shall mitigate the offense, and render the thief liable to a less severe punishment.

[217] 1 Whart. Crim. Law (10th Ed.) 862a; Ex

mon law of England. The distinction is based upon the statute of Westminster I. c. 15, above mentioned.[218] The distinction has been abolished in England.[219] In this country the statute of Westminster is a part of our common law, except where it has been superseded by our own statutes.[220] In some states no such distinction is made. In others it is expressly declared by statutes varying to some extent, as above stated, from the statute of Westminster, and from each other, with respect to the value of the property.[221] In some states the stealing of particular kinds of property,—as a horse, for example, —and the stealing from the person of another, or in a dwelling house, etc., is made

parte Bell, 19 Fla. 608; State v. Gray, 14 Rich. (S. C.) 174.

[218] 1 Hale, P. C. 530. And see 1 Hawk. P. C. c. 33, § 34; 2 East, P. C. 736.

[219] By 7 & 8 Geo. IV. c. 29; 24 & 25 Vict. c. 96, § 4.

[220] See State v. Gray, 14 Rich. (S. C.) 174.

[221] Thus, in Virginia, the value, to constitute "grand," as distinguished from "petit," larceny, must be over $——. In California, it must be over $50. Pen. Code, §§ 487, 488. In South Carolina, it must be $20, or more. Crim. St. § 160.

grand larceny, sometimes without regard the value of the property.[222]

The elements of petit larceny are p cisely the same as the elements of grand l ceny, except with respect to the value of property. "Wherever an offense wo amount to grand larceny, if the thing sto were above the value of twelve pence other value, according to the particular st ute), it is petit larceny if it be but of t value, or under." [223]

335. Determination of Value.

In ordinary cases there is no difficulty ascertaining the value of property for purpose of determining whether larceny grand or petit larceny, but difficult questi have arisen in some cases. The inqu should be as to the market value, if the pr erty has a market value, and not the va to the owner.[224] Where there is no mar value, the valuation should be a reasona one.[225]

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[222] Pen Code Cal. § 487; Crim. St. S. C. § See State v. Spurgin, 1 McCord (S. C.) 252.

[223] 1 Hawk. P. C. c. 33, § 34.

[224] State v. Doepke, 68 Mo. 208, 30 Am. Rep.

[225] 2 East, P. C. 736; State v. Doepke, supra.

If two persons stole goods above the value of twelve pence from the same person at the same time it was held to be grand larceny in both,[226] but it was otherwise if the acts of each were several at several times, and the goods taken at each time were of the value of twelve pence or under.[227] And if a person stole goods at different times, so that the larcenies were separate and distinct acts, even though from the same person, he was held not to be guilty of grand larceny if the property taken at any one time was not above the value of twelve pence, though all the property might be above that value.[228]

336. Felony or Misdemeanor.

Under the statute of Westminster, both grand larceny and petit larceny were felonies, though petit larcenies were not so severely punished.[229] In this country, where the statutes make such a distinction, petit larceny is generally a misdemeanor only.[230]

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[226] 2 East, P. C. 740; 1 Hale, P. C. 530.

[227] 2 East, P. C. 740; 1 Hale, P. C. 530.

[228] 2 East, P. C. 740; Rex v. Petrie, 1 Leach, C. C. 294. Compare 1 Hale, P. C. 530, 531.

[229] 1 Hale, P. C. 530; 1 Hawk. P. C. c. 33, § 36;

(G) Compound Larcenies.

337. Definition.—Compound larceny is larceny committed under certain aggravating circumstances, by reason of which it is punished more severely than simple larceny. Thus—

1. At common law, robbery is a compound larceny,—a felonious taking and carrying away of the property of another from his person or in his presence, by violence or by putting him in fear.
2. By statute in most jurisdictions larceny under certain circumstances is made a compound larceny. The principal statutory compound larcenies are:
   (a) Larceny from the person of another, not by violence or putting in fear.
   (b) Larceny from particular places, as a dwelling house, house, shop, vessel, etc., not accompanied by a breaking and entry with intent to steal, as in burglary.

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2 East, P. C. 736; 4 Bl. Comm. 229; Drennan v. People, 10 Mich. 169; Ward v People, 3 Hill (N. Y.) 395.

In England, after the statute of Westminster, the punishment for grand larceny was death and forfeiture of goods, subject to the benefit of clergy. The punishment for petit larceny was forfeiture of goods and whipping, or some other corporal punishment less than death. 1 Hale, P. C. 530.

[230] See State v. Setter, 57 Conn. 466.

In New York petit larceny is a misdemeanor. Pen. Code, § 535; People v. Finn, 87 N. Y. 533.

In North Carolina, the distinction between

338. Robbery.

The only common-law compound larceny is robbery. If larceny is committed by stealing from the person or in the presence of another, and is accomplished by violence or by putting him in fear, it becomes robbery, and not merely larceny. Robbery is treated and punished as a distinct felony, and will therefore be considered separately in another place.[231]

339. Larceny from the Person.

(*a*) *Statutes Requiring a Private Stealing.*—The English statute of 8 Eliz. c. 4, § 2, deprived of the benefit of clergy, to which simple larceny was subject, the felonious taking of money, goods, or chattels "from the person of any other, *privily, without his knowledge,*" in any place whatsoever.[232] And there are some statutes in this

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grand and petit larceny has been abolished, and all larceny has been reduced to the grade of petit larceny. See State v. Gaston, 73 N. C. 93, 21 Am. Rep. 459; State v. Stroud, 95 N. C. 626.

[231] Post, § 370.

[232] As this statute did not create a new offense, but merely deprived a person convicted of larceny from the person of the benefit of clergy, and as petit larceny did not stand in need of the benefit

country punishing larceny under such circumstances as a distinct crime.[233] A taking from the person of another openly, and with his knowledge, is not within such a statute.[234] A sudden snatching of property, where there is no such resistance and violence as is necessary to establish robbery,[235] is a private or secret taking, within the meaning of the statute.[236]

(*b*) *Statutes not Requiring a Private Taking.*—The present English statute omits the words "privily, without his knowledge,"

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of clergy, it was considered that the statute did not apply to petit larceny from the person. 4 Bl. Comm. 241; 1 Hale, P. C. 529; 2 East, P. C. 701.

This reasoning does not apply to our statutes, though they sometimes do require that the property shall be of a certain value, or over. See Code Va. 1887, § 3707, as amended in 1893-94 (Supp. 1898, § 3707).

[233] See Pen. Code Ga. § 175; Pen. Code Tex. arts. 879, 880.

[234] Brown's Case, 2 East, P. C. 702. And see Fanning v. State, 66 Ga. 167; Woodard v. State, 9 Tex. App. 412.

[235] Post, § 374.

[236] Steward's Case, 2 East, P. C. 702; Danby's Case, Id; Reg. v. Walls, 2 Car. & K. 214; Fanning v. State, 66 Ga. 167.

found in the statute of Elizabeth, and punishes generally a stealing "from the person" of another; and the same is true of most of the statutes in this country.[237] Under these statutes it is not necessary that the property be stolen secretly and without the other's knowledge, but the offense is committed when the taking is open and with his knowledge.[238]

(*c*) *Taking "from the Person."*—The statutes expressly require that the taking shall be "from the person," but, except where it is otherwise expressly provided,[239] the prop-

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[237] See 24 & 25 Vict. c. 96, § 40; Code Va. 1887, § 3707, as amended in 1893-94 (Supp. 1898, § 3707).

[238] Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699; Com. v. Dimond, 3 Cush. (Mass.) 235; Johnson v. Com., 24 Grat. (Va.) 555.

Bishop cites Moye v. State, 65 Ga. 754, as holding that such a statute contemplates a secret taking without the knowledge of the owner; but he evidently failed to examine the statute under which that case was decided. The Georgia statute does not appear in the report of the case, but an examination of it would have shown that, like the statute of Elizabeth, it in terms punishes larceny from the person of another "privately, and without his knowledge." Pen. Code Ga. § 175.

[239] By express provision of the Texas statute,

erty need not be attached to the person, or actually on the person, but it is sufficient if it be at the time under the protection of the person.[240] It *must* be under the protection of the person, and it is not always enough to show that it was in his presence. Thus, where a man went to bed with a prostitute, leaving his watch in his hat on the table,

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the taking must be actually from the person, and a taking of property in the mere presence of the owner is not enough Pen. Code Tex. art. 880; Woodard v. State, 9 Tex. App. 412.

[240] It was so held in Reg. v. Selway, 8 Cox, C. C. 235, Beale's Cas. 700, under the English statute punishing larceny "from the person." In this case, it appeared that the prosecutor, who was paralyzed, received, while sitting on a sofa in his room, a violent blow on the head from one of the defendants, while the other went to a cupboard in the same room, and stole a cash box therefrom. It was held that it was a question for the jury whether the cash box was at the time under the protection of the prosecutor, and that, if so, a charge of stealing from the person would be sustained.

See, also, Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699, where it was held that a taking of property in the presence of the owner (the property having been knocked from his hand, and taken by the accused from the ground) was, in point of law, a taking from the person.

and the woman stole the watch while he was asleep, it was held not to be larceny from the person, but larceny in the dwelling house.[241]

(*d*) *Persons Drunken or Asleep.*—It has been contended that the statutes contemplate a taking *from the care* of a person, and that the offense, therefore, cannot be committed from one who is asleep or drunken to insensibility, as such a person is incapable of exercising care; and some of the earlier cases were in favor of this view.[242] No such doctrine, however, is now recognized, but it is held that the offense may be committed as well when the victim is asleep or drunk as when he is awake and sober.[243] A watch in the pocket of a sleeping or drunken man is certainly under the protection of his person. In the English cases it has been held that a person who is asleep or drunk may be

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[241] Rex v. Hamilton, 8 Car. & P. 49. See, to the same effect, Com. v. Smith, 111 Mass. 429.

[242] See 2 East, P. C. 703, 704; Rex v. Hamilton, 8 Car. & P. 49.

[243] See Branny's Case, 1 Leach, C. C. 241, note, where the victim was drunk; and Thompson's Case, 1 Leach, C. C. 443, 2 East, P. C. 705; Willan's Case, 1 Leach, C. C. 495, 2 East, P. C. 705.

within the protection of the statute,[244] but some of the judges have held that the statute does not apply where the victim has voluntarily become drunk, without being induced to do so by the craft or cunning of the accused.[245]

(*e*) *Asportation.*—To constitute larceny from the person, there must be some asportation, as in the case of simple larceny and robbery, unless the statute, as in Texas, expressly declares that an asportation is not necessary.[246]

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[244] See the cases cited in the note preceding.

[245] Rex v. Gribble, 1 Leach, C. C. 240, 2 East, P. C. 706; Rex v. Kennedy, 2 Leach, C. C. 788, 2 East, P. C. 706.

These cases were decided on the ground that the statute "was intended to protect the property which persons, by proper vigilance and caution, should not be enabled to secure," and that "it did not extend to persons who, by intoxication, had exposed themselves to the dangers of depredation, by destroying those faculties of the mind by the exercise of which the larceny might probably be prevented." Rex v. Gribble, supra.

[246] The cases on this point will be found under simple larceny and robbery. See ante, §§ 321-325; post, § 370, et seq.

See Pen. Code Tex. art. 763; Flynn v. State, 42 Tex. 301.

(*f*) *Intent.*—It is also necessary that there shall be a felonious intent,— the same intent as in simple larceny at common law.[247]

(*g*) *Robbery Distinguished.* — Larceny from the person is distinguished from robbery in that in robbery the taking is accomplished by violence or by putting in fear, while in larceny from the person this element is wanting. If the owner of property resists an attempt to take it, and the resistance is overcome, there is, as we shall see, sufficient violence to make the offense robbery.[248] And the same is true if there is personal injury in the taking, as where a person is knocked down and then robbed, or an earring is torn from a woman's ear with sufficient violence to tear the ear.[249] But if a person's pocket is picked, or property is suddenly snatched from his hand, or head, no more force being used than is necessary to the mere act of snatching, the offense is not robbery, but larceny from the person.[250]

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[247] Ante, § 326 et seq.

[248] Post, § 370, et seq.

[249] Id.

Whether there can be a conviction of larceny

340. Larceny from Particular Places.

(*a*) *In General.*—At common law, to steal in a dwelling house or other particular place is merely simple larceny, and is not distinguished from other simple larcenies,[251] in the absence of a breaking and entry with intent to steal, which, as we have seen, is burglary.[252] The statute of 12 Anne, c. 7, enacted in 1713, [253] deprived of the benefit of clergy, to which simple larceny was subject, any person who should feloniously steal money, goods or chattels, wares or merchandise, of the value of forty shillings or more, being in any dwelling house, or outhouse thereunto belonging, although such house or outhouse should not be broken, and though

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from the person when the evidence shows a robbery will be considered in another volume.

[250] Reg. v. Walls, 2 Car. & K. 214; Steward's Case, 2 East, P. C. 702; Danby's Case, Id.; Fanning v. State, 66 Ga. 167.

[251] 2 East, P. C. 623. Thus, East defines larceny as the taking and carrying away of the mere personal goods of another "from any place," etc. 2 East, P. C. 553.

[252] See post, § 400.

[253] There were also earlier statutes punishing larceny in particular places. See 2 East, P. C. 623 et seq.

neither the owner nor any other person should be in the house at the time. This statute has been repealed, but the present statute punishes larceny in a dwelling house as a distinct offense, and more severely than simple larceny.[254] There are similar statutes in this country. Statutes have also been enacted, both in England and in this country, punishing larceny in other places than a dwelling house,—as from a "house," a "shop," a "warehouse," an "office," a "building," a "vessel," etc.[255]

(*b*) *The Place.*—To bring a case of larceny within such a statute as this, the place must come strictly within the terms of the statute. Thus, it has been held that a statute punishing larceny in an "office" does not apply to larceny in the passenger room of a railroad station, though it adjoins a separate

[254] The statute of 24 & 25 Vict. c. 96, § 60, prescribes a particular punishment for stealing, "in any dwelling house," any money, chattel, or valuable security, to the value in the whole of £5. Section 61 punishes such stealing when the thief shall, "by any menace or threat, put any one being therein in bodily fear."

[255] 24 & 25 Vict. c. 96, §§ 62-64; Pen. Code Minn. §§ 417, 418.

inclosed place where books are kept and tickets sold;[256] and a statute punishing larceny in a "house" does not apply to larceny in a tent.[257]

To come within a statute punishing larceny in or from a dwelling house, the house must be used and occupied as a dwelling. It must be such a house as is the subject of burglary; and, if it is such a house, it is within the statute.[258]

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[256] Com. v. White, 6 Cush. (Mass.) 181.

[257] Callahan v State, 41 Tex. 43.

[258] 2 East, P. C. 643; Rex v. Davis, 2 East, P. C. 499; Henry v. State, 39 Ala. 679. As to what is necessary to render a house the subject of burglary, see post, § 401, et seq.

In People v. Horrigan, 68 Mich. 491, it was held that the statute applied where one room in the basement of a house was occupied by a man as a regular dwelling place, though the upper part was used for offices. And in State v. Leedy, 95 Mo. 76, it was held that a hotel in which the keeper lived was his dwelling house, and that one who stole his shoes from the office was guilty of larceny in a dwelling house.

In State v. Clark, 89 Mo. 423, it was held that the term "dwelling house" did not include a basement or cellar with only an outside door, used for the storage of ice and beer, though there were rooms above it, occupied by families as a residence,

When a statute punishes larceny in "a house," or in "any house," it does not mean a dwelling house, but applies to larceny in a store, or a bank, or any other house, for whatever purpose it may be used, and whether it is occupied by any person or not.[259] Such a statute creates an offense against the property, and not, as in burglary, against the habitation.[260]

To constitute larceny from a "storehouse," or "warehouse," the building must be used as a storehouse, or warehouse, as the case may be. It is not enough that it was built for such a purpose.[261]

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where there was no internal communication between it and the rooms above, and the families living above had no interest in it, or control over it. It would be otherwise if the family living above also owned or used the cellar.

[259] Stanley v. State, 58 Ga. 430. A tent is not a "house." See note 257, supra.

[260] Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885.

[261] Jefferson v. State, 100 Ala. 59.

A "warehouse" is a place for the reception and storage of goods and merchandise. See Lynch v. State, 89 Ala. 18. A cellar used for the deposit of goods intended for removal and sale was held a "warehouse," within the meaning of an English

(*c*) *The Property must be under the Protection of the House.*—Some of the statutes punish larceny "in" the house, while others punish larceny "from" the house; but it has been said that they mean the same thing.[262] Under both the property must be under the protection of the house.[263] For this reason it has been held that it is not larceny in a dwelling house to steal clothes from the railing or banisters of a piazza attached to a dwelling house;[264] nor larceny from a house

statute. Reg. v. Hill, 2 Mood. & R. 458. "A warehouse," in the Kentucky statute, was held to mean any house, not an office or shop, in which goods, wares, or merchandise are usually deposited for safe-keeping or for sale, and the term was held to include a granary used for storage of farming utensils and the like. Ray v. Com., 12 Bush. (Ky.) 397. And see Hagan v. State, 52 Ala. 373. It is not larceny from a warehouse to take a trunk at a railroad station from a passage way extending between the baggage room and reception room, and under a common roof with them, but not inclosed on any side. Lynch v. State, 89 Ala. 18.

[262] Martinez v. State, 41 Tex. 126.

[263] Rex v. Owen, 2 Leach, C. C. 572, 2 East, P. C. 645; Com. v. Smith, 111 Mass. 429, Beale's Cas. 703; Com. v. Lester, 129 Mass. 101, Beale's Cas. 705; Martinez v. State, 41 Tex. 126; Henry v. State, 39 Ala. 679.

[264] Henry v. State, 39 Ala. 679.

to steal property which is hanging outside of a store door on a piece of wood nailed to the door and projecting towards the street.[265]

Property is not under the protection of the house if it is under the eye or personal care of the owner of the house or of someone else who happens to be in the house. In such a case it is under the protection of the person, and stealing it is larceny from the person, and not larceny in or from the house.[266] The

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[265] Martinez v. State, 41 Tex. 126. See, also, Lynch v. State, 89 Ala. 18. In People v. Wilson, 55 Mich. 506, Judge Cooley said that it might be a question whether taking a barrel of oil from in front of a store was not larceny from the store, but the point was not decided or discussed. Burge v. State, 62 Ga. 170, however, is opposed to the view stated in the text. It was there held that it was larceny from the house to steal a watch which was hanging on a post covered by the roof of a house. In an earlier case, however, the same court held that stealing property from a sidewalk or alley in front of a building was not within the statute. Middleton v. State, 53 Ga. 248.

[266] Rex v. Owen, 2 Leach, C. C. 572, 2 East, P. C. 645; Rex v. Campbell, 2 Leach, C. C. 564, 2 East, P. C. 644; Com. v. Smith, 111 Mass. 429, Beale's Cas. 703.

In Com. v. Lester, 129 Mass. 101, Beale's Cas. 705, a person in whose hands a shop keeper had

mere presence of the owner, however, does not prevent the property from being under the protection of the house.[267]

(*d*) *Who may Commit the Offense.*—It was early decided that a statute punishing larceny in a dwelling house does not apply to stealing by a person in his own house, nor to a stealing by a wife in her husband's

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placed goods for inspection ran off with them when the shop keeper momentarily turned his back. It was held that the goods were not at the time under the protection of the building, and that the theft was not larceny in a building.

[267] Rex v. Taylor, Russ. & R. 418; Rex v. Hamilton, 8 Car. & P. 49; Com. v. Smith, 111 Mass. 429, Beale s Cas. 703; Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885.

Thus, property that is in the room of a person who is asleep, and not actually on his person, is under the protection of the house, and not of the person, and stealing it is larceny in the house. Rex v. Taylor, supra; Rex v. Hamilton, supra; Com. v. Smith, supra.

In Simmons v. State, supra, a person went into a bank, and deposited on the counter a satchel containing money, and, while he was standing within about two feet of it, another person distracted his attention, and a third person abstracted money from the satchel. This was held to be larceny from the house. The decision is a very doubtful one.

house, which, for this purpose, is the same as her own,[268] as the statute is intended "to protect the owner's property in his own house from the depredation of others, or the property of others lodged in his house; thereby giving protection against all but the owner himself." [269] The same construction has been placed upon statutes punishing larceny in other places than dwelling houses, as in stores and other buildings,[270] and in vessels.[271]

In Texas the statute punishing theft in a house expressly declares that it shall not apply to "a domestic servant or other inhabitant of such house." [272]

(*e*) *Ownership of the Property.*—Under these statutes the property need not be that

[268] Rex v. Gould, 1 Leach, C. C. 217, 2 East, P. C. 644; Rex v. Thompson, 1 Leach, C. C. 338, 2 East, P. C. 644; Com. v. Hartnett, 3 Gray (Mass.) 450, Beale's Cas. 701.

[269] 2 East, P. C. 644; Metcalf, J., in Com. v. Hartnett, supra.

[270] Com. v. Hartnett, supra.

[271] Rex v. Madox, Russ. & R. 92, Beale's Cas. 641.

[272] This exception does not apply to a servant whose employment is out of doors, and not in the house, or to a lodger, boarder, or visitor in the

of the owner or occupant of the house, unless the statute so requires.[273]

(*f*) *Entry of the Premises.*—There need be no entry into the house with intent to steal, unless this is required by the statute.[274] Nor, in the absence of such a requirement, need the entry be without the consent of the owner or occupant; but the offense may be committed by one who is invited to enter.[275] Some statutes, however, punish anyone who shall enter a house and commit the crime of larceny, thus making an entry an element of the offense; and it has been held that under such a statute the entry must be without the consent of the owner or occupant, unless there is an intent to steal at the time of the entry.[276]

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house. Wakefield v. State, 41 Tex. 556; Williams v. State, 41 Tex. 649; Ullman v. State, 1 Tex. App. 220.

In Taylor v. State, 42 Tex. 387, a porter in a barroom, who cleaned up the room, etc., was held a domestic servant, within the meaning of the statute.

[273] Hill v. State, 41 Tex. 157; Simmons v. State, 73 Ga. 609, 54 Am. Rep. 885.

[274] Berry v. State, 10 Ga. 511.

[275] Point v. State, 37 Ala. 148.

[276] State v. Chambers, 6 Ala. 855.

(*g*) *Asportation.*—To constitute larceny in or from a dwelling house, house, vessel, or other particular place, there must be an asportation, unless dispensed with by the statute, for this is a necessary element of the larceny.[277] It is not necessary, however, that the property shall be carried out of the house or off the vessel. It is enough if there be such an asportation within the house or on the vessel as is sufficient to make the larceny complete.[278]

(*h*) *Intent.*—To constitute larceny under these statutes the same felonious intent is necessary as in simple larceny.[279]

II. EMBEZZLEMENT.

341. Definition.—Embezzlement is a statutory and not a common-law offense. The statutes vary so much in the different jurisdictions that it is impossible to frame a definition that will apply in all. It may be defined generally, however, as the fraudulent conversion or appropriation by a serv-

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[277] Ante, § 321 et seq.

[278] Thus, it was held larceny from a vessel, under the Georgia statute, where a box of shoes on a vessel was broken open, and some of the shoes taken out and concealed on the vessel. Nutzel v. State, 60 Ga. 264.

[279] See Ward v. Com., 14 Bush. (Ky.) 233; ante, § 326 et seq.

ant, clerk, agent, bailee, officer of a corporation, public officer, or other person specified in the statute, of money or property which has come into his possession by virtue of his employment or office, or for or on account of his master, principal, or employer. The following elements are generally essential:

1. The thing appropriated must come within the terms of the statute.
2. The property must have been that of the master, principal, or employer, or some one else other than the accused.
3. Under most of the statutes, it must have been in the possession of the accused, and not in the actual or constructive possession of the master, principal, or employer, at the time of the conversion or appropriation.
4. It must have come into the possession of the accused, and been held by him, by virtue of his employment or office, or for or on account of his master, principal, or employer, according to the terms of the particular statute, so as to create a relation of trust or confidence.
5. It must have been converted or appropriated by the accused.
6. There must have been a fraudulent intent, as in larceny, to deprive the owner of his property.
7. The accused must have occupied such a relation or position as to come strictly within the terms of the statute.

342. Object of the Statutes.

The statutes punishing embezzlement were primarily intended to reach and punish the fraudulent conversion of property which could not be punished as larceny because of the absence of a trespass, and their object must be borne in mind in construing them.[280] As was shown in treating of larceny, a person who has obtained *possession* of property lawfully, and without an intent to steal, does not commit larceny in afterwards converting the property to his own use so long as such lawful possession continues.[281] This is true of bailees generally. It is also true of a servant who receives property from his master as bailee, and not as servant, and fraudulently converts the same to his own use,[282] or who receives property from a third person for his master, and converts the same before it has reached the actual or constructive possession of the master.[283] It was to reach

[280] Rex v. Headge, Russ. & R. 160, Beale's Cas. 706; Com. v. Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662, Beale's Cas. 711; Com. v. Berry, 99 Mass. 428, Beale's Cas. 714.

[281] Ante, § 316.

[282] Ante, § 317f (2).

[283] Ante, § 317f(3).

and punish cases like these that most of the embezzlement statutes were enacted.[284]

343. Particular Statutes.

(*a*) *In General.*—The original English statute was the statute of 39 Geo. III. c. 85, enacted in 1799. This statute in substance punished embezzlement by a servant or clerk of property received or taken into his possession by virtue of his employment, for or in the name or on account of his master or employer.[285] The statute of 7 & 8 Geo. IV. c.

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[284] Rex v. Headge, supra; Com. v. Hays, supra; Com. v. Berry, supra.

[285] The language of this statute was: "If any servant or clerk, or any person employed for the purpose, or in the capacity of a servant or clerk to any person or persons whomsoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name or on account of his master or masters, employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use, or in whose name or names, or on whose account, the same was or were delivered to or taken in the possession of such servant, clerk,

49, § 47, was similar. The present statute, 24 & 25 Vict. c. 96, § 68, is somewhat different. It omits the words "by virtue of his employment," and punishes embezzlement by a clerk or servant of property "delivered to or received or taken into possession by him for or in the name or on account of his master or employer." [286] In this country some of the statutes are like that of Geo. III.,[287] while others are more or less like that

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or other person so employed, although such money * * * was or were not otherwise received into the possession of such master or masters, employer or employers, than by the actual possession of his or their servant, * * * so employed."

[286] The language of this statute is: "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same, although such chattel * * * was not received into the possession of such master or employer otherwise than by the actual possession of his clerk," etc.

[287] See Bates' Ann. St. Ohio, § 6842; Pen. Code Cal. § 508; Crim. Code Ala. § 4659.

of Victoria.[288] Some differ very materially from both.[289] In most states there are also statutes punishing embezzlement by others than clerks and servants, as agents, bailees, officers of corporations, public officers, etc.[290]

(*b*) *Statutes Relating to Banks.*—In many states statutes have been enacted expressly punishing embezzlement by officers and employes of banks.[291] And an act of congress punishes embezzlement by officers and employes of national banks.[292] The latter matter is within the exclusive jurisdiction of the federal courts, and such embezzlement cannot be punished in a state court, even though a state statute may provide therefor.[293]

(*c*) *Statutes Relating to Public Officers and Employes.*—Perhaps in all states there

[288] See the various state statutes.

[289] See Pen. Code N. Y. § 528; Crim. Code Ill. §§ 165, 166; Pub. St. Mass. p. 1143, §§ 37-41.

[290] Bates' Ann. St. Ohio, § 6842; Pen. Code N. Y. § 528; Crim. Code Ill. § 166; Crim. Code Ala. § 4659.

[291] See 10 Am. & Eng. Enc. Law (2d Ed.) 1013.

[292] Rev. St. U. S. § 5209.

[293] Com. v. Felton, 101 Mass. 204; Com. v. Ketner, 92 Pa. St. 372, 37 Am. Rep. 692; State v. Tuller, 34 Conn. 280.

are statutes specifically punishing embezzlement of public moneys by public officers and employes, as state officers, and county, municipal, and township officers and employes.[294] And there are several acts of congress punishing embezzlement by United States officers.[295]

(*d*) *Embezzlement from the Mails.*—Statutes have also been enacted by congress punishing specifically embezzlement from the mails, and the stealing of letters and their contents, by postmasters, postal clerks, mail carriers, and private individuals.[296]

344. The Subject of Embezzlement.

(*a*) *In General.*—A thing, to be the subject of embezzlement, must come within the terms of the statute. Some statutes make anything that is the subject of larceny the subject of embezzlement, and this makes things that are made the subject of larceny by statute the subject of embezzlement

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[294] See 10 Am. & Eng. Enc. Law (2d Ed.) 1018 et seq.

[295] Rev. St. U. S. §§ 5488-5493; Act Feb. 3, 1879 (1 Supp. Rev. St. p. 213), amending Rev. St. § 5497.

[296] Rev. St. U. S. §§ 3892, 5467, 5469.

also.[297] Other statutes use particular terms in specifying what shall be the subject of the offense, as "goods and chattels,"[298] "property,"[299] "money,"[300] "effects,"[301] etc.

(*b*) *Value.*—The property must be of some value,[302] but the extent of the value is

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[297] State v. Stoller, 38 Iowa, 321.

[298] Choses in action, as promissory notes, bonds, etc., are not goods and chattels. 2 Bish. New Crim. Law, § 358.

[299] The term "property" is broader than "goods and chattels," and includes choses in action, as promissory notes, etc. Com. v. Stearns, 2 Metc. (Mass.) 343; State v. Orwig, 24 Iowa, 102; a mortgage, Com. v. Concannon, 5 Allen (Mass.) 502; a railroad ticket, Com. v. Parker, 165 Mass. 526; stock in a private corporation, People v. Williams, 60 Cal. 1; bonds of a municipal corporation, Bork v. People, 91 N. Y. 5, and State v. White, 66 Wis. 343.

[300] In Block v. State, 44 Tex. 620, it was held that the term "money" did not include United States treasury notes or national bank notes. And see 2 Bish. New Crim. Law, § 357.

[301] The term "effects" covers choses in action, such as promissory notes, bills of exchange, etc. See State v. Newell, 1 Mo. 249; Rex v. Aslett, 2 Leach, C. C. 954; Rex v. Bakewell, 2 Leach, C. C. 943.

[302] Perry v. State, 22 Tex. App. 19; Wolverton

not material unless made so by statute.[303] In some states the statute makes the offense a felony or a misdemeanor according to the value of the property.[304]

(*c*) *Ownership.*—A person cannot embezzle property of which he is himself the owner,[305] or which he owns jointly with another, or out of which he is entitled to a commission as to which there has been no accounting.[306] Some statutes require that the property shall be the property of the master or employer, etc. Others merely require that it shall be "the property of another."

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v. Com., 75 Va. 909; U. S. v. Nott, 1 McLean, 499, Fed. Cas. No. 15,900.

"Valuable security or effects" does not include invalid instruments. Rex v. Aslett, 2 Leach, C. C. 954.

[303] See Washington v. State, 72 Ala. 272; People v. Salorse, 62 Cal. 139; People v. Bork, 78 N. Y. 346.

[304] See State v. Mook, 40 Ohio St. 588; Gerard v. State, 10 Tex. App. 690; Harris v. State, 21 Tex. App. 478.

[305] Reg. v. Barnes, 8 Cox, C. C. 129, Beale's Cas. 710; State v. Kent, 22 Minn. 41, 21 Am. Rep. 764; State v. Kusnick, 45 Ohio St. 535, 4 Am. St. Rep. 564.

[306] Reg. v. Brew, Leigh & C. 346; State v. Kent, supra.

a statute does not apply to any case which is larceny at common law.[313]

Statutes not Expressly Requiring Possession by the Accused.—Some of the statutes in this country are in much broader terms than the English statute, and do not expressly require that the property shall have come into the possession of the accused,[314] and in construing these statutes the courts have differed. Most courts, however, have held that the statutes, being intended to supplement the law of larceny, and supply supposed defects therein, are not to be construed as applying to a conversion of property that amounts to larceny; and that they apply, therefore, only where the accused had

[313] See Rex v. Headge, Russ. & R. 160, Beale's Cas. 706.

[314] Thus, in Illinois, a statute punishes any person who shall embezzle or fraudulently convert to his own use "money, goods, or property delivered to him, which may be the subject of larceny," etc. Crim. Code Ill. § 165. There are similar statutes, or substantially similar ones, in Massachusetts and other states. Pub. St. Mass. p. 1143.

In South Carolina, a statute declares broadly that "any person committing a breach of trust with a fraudulent intent" shall be held guilty of larceny. See State v. Shirer, 20 S. C. 392.

345. Possession at the Time of Conversion.

(*a*) *In General.*—As was stated in a previous section, the object of the statutes punishing embezzlement is to reach and punish persons who fraudulently appropriate or convert to their own use money or property which at the time is in their lawful possession, so that, as they do not commit a trespass, they are not guilty of larceny. This object, as we shall see, is taken into consideration by most of the courts in construing the statutes.

Statutes Expressly Requiring Possession by the Accused.—Some of the statutes, like the original and the present English statutes, expressly require that the money or other property shall have been in the "possession" of the accused at the time of the conversion.[310] Clearly, under such a statute as this, a person who has the bare custody of property, as distinguished from the possession, is not guilty of embezzlement in converting it to his own use,[311] but is guilty of larceny.[312] It has been considered that such

[310] See ante, § 343, notes.

[311] Rex v. Murray, 1 Mood. C. C. 276, 5 Car. & P. 145.

[312] Ante, § 317.

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[310] See ante, § 343, notes.

[311] Rex v. Murray, 1 Mood. C. C. 276, 5 Car. & P. 145.

[312] Ante, § 317.

of authority, is he guilty under a statute which does not expressly require possession.[318]

A master may deliver property to his servant under such circumstances as to give him the possession, and not merely the custody, as where he lends him a horse or other property to use in his own business; and in such a case the servant, if he fraudulently converts the property to his own use, is guilty, not of larceny, but of embezzlement,[319] like any other bailee.[320]

Delivery by Third Persons to Servant.— When money or property is delivered by a third person to a servant for or on account of his master, the servant has the possession, and is in the position of a mere bailee, until he has delivered the money or property to the master, or put it, intending to do so for the master,[321] where it is his duty to put it:

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[318] Com. v. Berry, 99 Mass. 428, 96 Am. Dec. 767, Beale's Cas. 714; Johnson v. People, 113 Ill. 99; People v. Belden, 37 Cal. 51. Contra, State v. Wingo, 89 Ind. 204; State v. Shirer, 20 S. C. 392.

[319] See ante, § 317b.

[320] Post, § 345c.

[321] See Com. v. Ryan, 155 Mass. 523, 31 Am. St. Rep. 560, Beale's Cas. 543.

and, if he fraudulently converts it before this, he is guilty of embezzlement, and not of larceny.[322] After he has disposed of the property, however, by putting it in the proper place for the master, as in the safe, or money drawer, or cart, etc., it is in the constructive possession of the master, and, if the servant afterwards converts it, his offense is larceny, and not embezzlement.[323]

(*c*) *Embezzlement by Bailees—Possession Lawfully Acquired.*—As was shown in treating of larceny, one who is himself in lawful possession of property cannot commit a trespass, and therefore cannot be guilty of larceny, in fraudulently converting the property to his own use.[324] A hirer of property, a carrier, a warehouseman, or any other bailee,

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[322] Rex v. Headge, Russ. & R. 160, Beale's Cas. 706; Rex v. Sullens, 1 Mood. C. C. 129; Rex v. Walsh, Russ. & R. 215; Reg. v. Rud, Dears. C. C. 257, 6 Cox, C. C. 284, Beale's Cas. 536; Com. v. King, 9 Cush. (Mass.) 284; Com. v. Ryan, 155 Mass. 523, 31 Am. St. Rep. 560, Beale's Cas. 543; Kibs v. People, 81 Ill. 599.

[323] Com. v. Ryan, supra; Reg. v. Rud, supra; Reg. v. Norval, 1 Cox, C. C. 95, Beale's Cas. 535. And see ante, § 317b (3).

[324] Ante, § 316a.

if he has obtained possession lawfully and without a felonious intent, cannot commit larceny by converting the property to his own use while the bailment continues.[325] In such a case he is guilty of embezzlement under the statutes punishing embezzlement by bailees, or by persons generally.[326]

Possession Obtained with Felonious Intent.—On the other hand, a person who obtains property by delivery from the owner or a third person under circumstances that would ordinarily make him a bailee, and give him the possession, commits a trespass, and is guilty of larceny, if he has a felonious intent to steal the property at the time he receives it.[327] And in such a case, by the weight of authority, he cannot be indicted and convicted under the statutes punishing embezzlement.[328]

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[325] Ante, § 316b.

[326] Com. v. Simpson, 9 Metc. (Mass.) 138; Com. v. Doherty, 127 Mass. 20; People v. Husband, 36 Mich. 306; People v. Salorse, 62 Cal. 139; Hutchison v. Com., 82 Pa. St. 472.

[327] Ante, § 316c.

[328] People v. Salorse, 62 Cal. 139; People v. De Coursey, 61 Cal. 134; Johnson v. People, 113 Ill. 99; Quinn v. People, 123 Ill. 333; Moore v.

Termination of Bailment.—If a bailment is terminated, either by the terms of the contract of bailment, or by operation of law because of the wrongful act of the bailee, the possession revests constructively in the bailor, and a subsequent fraudulent conversion by the bailee is larceny.[329] Thus, the hirer or borrower of a horse to ride to a certain place, or to use for a certain time only, terminates the bailment if he rides it to a different place, or keeps it for a longer time, and, if he converts it to his own use after the bailment is thus terminated, he is guilty of larceny.[330] The same is true of a carrier or other bailee who breaks bulk and then converts the property to his own use.[331] According to the prevailing doctrine these cases do not fall within the statutes punishing embezzlement.[332]

U. S., 160 U. S. 268. Contra, State v. Tabener, 14 R. I. 272, 51 Am. Rep. 382.

[329] Ante, § 316e.

[330] Ante, § 316e (2); Tunnard's Case, 1 Leach, C. C. 214, note, Beale's Cas. 640.

[331] Ante, § 316e (3); Com. v. James, 1 Pick. (Mass.) 375, Beale's Cas. 645.

[332] See Com. v. Davis, 104 Mass. 548; Com. v. Barry, 116 Mass. 1; Johnson v. People, 113 Ill. 99.

(*d*) *Persons Other than Servants Having the Mere Custody.*—The distinction between possession and custody applies also to other persons than servants. The linen and tableware of an inn-keeper in the hands of a guest is in the constructive possession of the inn-keeper, and in the mere custody of the guest, and the latter commits larceny if he steals it.[333] The same is true of money or goods delivered to another to be examined or dealt with in some way in the owner's presence. He has the custody merely, and his fraudulent conversion of the money or goods is larceny.[334] Under such circumstances, therefore, the conversion would not be within the statutes of embezzlement.[335]

346. Character in Which the Property Is Received or Held.

(*a*) *In General.*—The statutes punishing embezzlement generally require that the property shall have been received or held in possession by the accused in some particular character, or for some particular purpose,

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[333] Ante, § 317 c.

[334] Ante, § 317 c.

[335] People v. Johnson, 91 Cal. 265; Com. v. O'Malley, 97 Mass. 584, Beale's Cas. 518.

and, when this is the case, the conversion of property will not be embezzlement, unless the property was so received or held.[336] This is true, for example, of a statute punishing conversion by a carrier or other person of money or other property delivered to him "to be carried for hire," [337] and of a statute punishing the conversion of property delivered to a person "for safe custody." [338] A conversion, to be punishable as embezzlement, must come strictly within the statute. As was said in a Massachusetts case: "Embezzlement always presents a case of a breach of trust, but every breach of trust is by no means embezzlement." [339]

(*b*) *Relation of Trust or Confidence.*— There are statutes in some jurisdictions expressly requiring that the property shall be

[336] Reg. v. Newman, 8 Q. B. Div. 706; State v. Stoller, 38 Iowa, 321; Com. v. Williams, 3 Gray (Mass.) 461; Johnson v. Com., 5 Bush (Ky.) 431.

[337] State v. Stoller, 38 Iowa, 321.

[338] Reg. v. Newman, 8 Q. B. Div. 706.

[339] Per Bigelow, J., in Com. v. Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662, Beale's Cas. 711. See, also, Com. v. Stearns, 2 Metc. (Mass.) 345; Webb v. State, 8 Tex. App. 310.

held under a trust, and in such a cas
course, a trust relation is essential.[340]

Even when the statute is in the most
eral terms, and does not expressly requ
relation of trust or confidence, the c
have construed them as limited to cas
which there is such a relation, in view o
fact that the statutes of embezzlement
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which a person converts property of w
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livery to him, either by or for the own
Thus, under a Massachusetts statute pu
ing any person to whom any money, g
or other property, which may be the su
of larceny, "shall have been delivered,"
who shall embezzle the same, it has been
that there must be a delivery of propert
der such circumstances as to create a rel
of trust or confidence, and that the st
does not apply, therefore, to one who f
ulently converts to his own use money
paid him by mistake.[342]

[340] Keeller v. State, 4 Tex. App. 527.

[341] Com. v. Hays, 14 Gray (Mass.) 62, 74
Dec. 662, Beale's Cas. 711.

[342] Com. v. Hays, supra. And see Com
Stearns, 2 Metc. (Mass.) 345.

(*c*) *Receipt of Property by Virtue of Employment.*—The original English statute of 39 Geo. III. c. 85, punished embezzlement by a clerk or servant of such property only as should be received or taken into his possession, "by virtue of his employment;" and many of the statutes in this country either use this language, or require that he shall have received the property "in the course of his employment." [343] Under such a statute the property must have been so received. It is not embezzlement for a servant to convert to his own use property received by him on his own account, and not in the course of his employment.[344] Some courts have held that it is not embezzlement under such a statute for a servant, agent, or other person to convert property, if, in receiving the same, he

[343] Ante, § 343, note.

[344] Rex v. Mellish, Russ. & R. 80; Rex v. Snowley, 4 Car. & P. 390; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21; People v. Sherman, 10 Wend. (N. Y.) 298, 25 Am. Dec. 563; Johnson v. State, 9 Baxt. (Tenn.) 279; Griffin v. State, 4 Tex. App. 390; Brady v. State, 21 Tex. App. 659 (where an employe, without any authority at all, collected and converted to his own use money due to his employer).

acted in excess of his authority, or contrary to his master's or employer's directions.[345] Other courts have taken a different and more reasonable view of the statute, and have held that a man may receive property by virtue of his employment, or in the course of his employment, and be guilty of embezzlement in converting the same, though he may have acted in excess of his authority in receiving it.[346]

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[345] Thus, in Rex v. Snowley, 4 Car. & P. 390, Parke, J., held that a servant who was employed to lead a stallion, and who received a sum for the hire of the same, which was less than he was authorized by his master to take, and converted the same to his own use, was not within the statute because the receipt of the money was not within his authority, and therefore not "by virtue of his employment." And see, to the same effect on different facts, Rex v. Hawtin, 7 Car. & P. 281; Reg. v. Harris, Dears. C. C. 344, 6 Cox, C. C. 363.

Some courts have held that a person who collects money for or in the name of another is estopped, in a prosecution for embezzlement, from denying that he had authority to receive it. See People v. Treadwell, 69 Cal. 226; Ex parte Ricord, 11 Nev. 287. But this view cannot be sustained without ignoring the express terms of the statute.

[346] Thus, in Rex v. Beechey, Russ. & R. 318, it

(*d*) *Receipt by Virtue of Office.* — The statutes punishing embezzlement by officers of banks and other private corporations or associations generally in terms require that the money or property shall have come into their possession by virtue of their office, and, in the absence of such an express requirement, it would undoubtedly be implied. Unless it was so received, therefore, an indictment cannot be sustained.[347] The same

was held that a clerk who was authorized to receive money at home which outdoor collectors received abroad from customers, and who, in one instance, took a sum of money directly from a customer out of doors, was within the statute. And in Rex v. Williams, 6 Car. & P. 626, it was held that a servant was none the less guilty of embezzlement because he received the money from one of a class of persons from whom he was not authorized to receive money. See, also, Reg. v. Aston, 2 Car. & K. 413; Ex parte Hedley, 31 Cal. 109: Ker v. People, 110 Ill. 627, 51 Am. Rep. 706.

[347] Thus, an officer of a corporation or association cannot be indicted for embezzlement with respect of funds received and converted by him before he became an officer. Lee v. Com. (Ky.) 1 S. W. 4. See, also, State v. Johnson, 21 Tex. 775; Bartow v. People, 78 N. Y. 377; People v. Gallagher, 100 Cal. 466.

is true of statutes punishing embezzlemen by public officers.[348]

(*e*) *Receipt for or in the Name or on Account of Master or Employer.*—Some of th statutes, like the present English statute,[349] instead of requiring that the money or pro erty shall have been received by the accuse "by virtue of his employment," merely r quire that it shall have been received "for in the name or on account of" his master employer.[350] Under such a statute as th it is essential that the property shall ha been received by the accused for or in t name or on account of his employer, and n for himself or on his own account, nor for on account of some third person.[351] It is n

[348] State v. Bolin, 110 Mo. 209. In this ca a statute punishing any officer who should e bezzle public money received by him "by virt of his office, or under color or pretense thereo did not apply to one who had no right to publ money by virtue of his office, but who obtain possession thereof by falsely representing that had such a right, and afterwards converted t same to his own use.

[349] Ante, § 343, note 286.

[350] Ante, § 343, note 285

[351] Reg. v. Harris, Dears. C. C. 344, 6 Cox, C. 363, 25 Eng. Law & Eq. 579; Reg. v. Cullum, L.

necessary, however, as under the statutes requiring receipt by virtue of his employment, that he shall have had authority to receive the property, either express or implied.[352]

347. Persons Who are Within the Statutes.

(*a*) *In General.*—Generally the statutes punishing embezzlement only apply in terms to persons occupying particular relations or positions, as servants, agents, bailees, officers of corporations, or particular kinds of corporations, public officers, or particular public officers, etc. And to sustain an indictment for embezzlement it must appear that the accused occupies such a relation or position as to bring him strictly within the

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2 C. C. 28, 12 Cox, C. C. 469, Beale's Cas. 707; Reg. v. Beaumont, Dears. C. C. 270.

Thus, where the captain of a vessel in the employ of the owner, whose duty it was to receive and carry such cargoes as the owner should direct, and account for the proceeds, took on a cargo contrary to orders, on his own account, and received and appropriated the freight, it was held that he was not guilty of embezzlement, as he did not receive the money for or in the name or on account of his master or employer, as required by the statute, but on his own account. Reg. v. Cullum, supra.

[352] Reg. v. Cullum, supra.

statute.[353] His being within the intent and spirit of the statute is not enough.[354]

(*b*) *"Clerks" and "Servants."* [355]—Thus, a statute punishing embezzlement by a "clerk" or "servant" does not apply to embezzlement by a person who stands in the relation of agent or bailee.[356] To be a clerk or servant one must be under the immediate direction and control of his master or employer.[357] He must not be engaged in an in-

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[353] Reg. v. Turner, 11 Cox, C. C. 551; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21; Lycan v. People, 107 Ill. 423; State v. Snell, 9 R. I. 112; Griffin v. State, 4 Tex. App. 390.

[354] State v. Butman, 61 N. H. 511, 60 Am. Rep. 332.

[355] For a full treatment of the question, who are clerks or servants, see 11 Am. & Eng Enc. Law (2d Ed.) 999-1003.

[356] Reg. v. Bowers, 10 Cox, C. C. 250; Reg. v. Walker, 8 Cox, C. C. 1; Reed v. State, 16 Tex. App. 586; People v. Burr, 41 How. Prac. (N. Y.) 293; Com. v. Stearns, 2 Metc. (Mass.) 343; Com. v. Libbey 11 Metc. (Mass.) 64, 45 Am. Dec. 185.

[357] Reg. v. Bowers, supra; Reg. v. Walker, supra; Gravatt v. State, 25 Ohio St. 162.

"'Servant' implies one employed in the service of another, who is under the immediate control of his master, and who is to carry out his master's behests under his implicit directions, and

dependent trade or business, and employed to perform services in the course of such trade or business.[358] One who is under the immediate direction and control of his em-

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usually with no option in the servant as to how or when the work shall be done. 'Agent' signifies one employed in the service of another, and who not only does for that other, but represents him, and acts for him in his name and stead. It implies a delegated authority." 11 Am. & Eng. Enc. Law (2d Ed.) 997, 998, and cases cited pages 999-1003. And see People v. Treadwell, 69 Cal. 226; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21.

In Reg. v. Turner, 11 Cox, C. C. 551, it was said by Lush, J. "If a person says to another, 'If you get any orders for me I will pay you a commission,' and that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a clerk or servant; but if a man says, 'I employ you, and will pay you, not by salary, but by commission,' then the person employed is a servant. And the reason for such distinction is this, that the person employing has no control of the person employed, as in the first case. But where, as in the second instance I have put, one employs another and binds him to use his time and services about his (the employer's) business, then the person employed is subject to control."

[358] Reg. v. Hall, 13 Cox, C. C. 49; Com. v. Young, 9 Gray (Mass.) 5; People v. Burr, 41 How. Prac. (N. Y.) 293; Com. v. Stearns, 2 Metc.

ployer is a clerk or servant within the mea
ing of the statute.[359] A mere volunteer, w
is not employed to perform a service, b
who does so by request in a single instanc
is not a clerk or servant.[360] According to t
better opinion, compensation is not absolute
necessary to render one a clerk or serva
within the meaning of the statute.[361] A
employe may be a clerk or servant thou
paid by commission, and not by salary.[3
By the weight of authority the employmen
to constitute one a servant, need not be f
any particular length of time, but may
for a single occasion only.[363] And it is n

(Mass.) 343; Com. v. Libbey, 11 Metc. (Mas
64, 45 Am. Dec. 185.

[359] Reg. v. Turner, 11 Cox, C. C. 551; Reg.
Bailey, 12 Cox, C. C. 56.

[360] Rex v. Nettleton, 1 Mood. C. C. 259; Reg.
Hoare, 1 Fost. & F. 647; Reg. v. Mayle, 11 C
C. C. 150.

[361] Reg. v. Hoare, 1 Fost. & F. 647; State
Barter, 58 N. H. 604; State v. Brooks, 85 Io
366. Compare 1 Whart. Crim. Law (10th E
§ 1014.

[362] Reg. v. Turner, 11 Cox, C. C. 551; Reg.
Tite, Leigh & C. 29; Rex v. Carr, Russ. & R. 1

[363] Rex v. Smith, Russ. & R. 384; Reg.
Thomas, 6 Cox, C. C. 403; Reg. v. Winnall,

necessary that there shall be a formal appointment. One who acts as servant for another, with the other's acquiescence, is a servant *de facto,* and within the statute.[364]

(*c*) *"Agents."* [365] — A statute punishing embezzlement by agents applies only to persons who stand in the legal relation of agent of another. An agent is one to whom is delegated authority to act for and in the name of his employer, and who is not under his employer's immediate direction and control.[366] The term does not include mere clerks or servants. Nor does it include a mere naked bailee,[367] or a hirer of property or other bailee who receives the property for his own use and benefit.[368]

Cox, C. C. 326; State v. Costin, 89 N. C. 511; State v. Barter, 58 N. H. 604; State v. Foster, 37 Iowa, 404. Contra, Rex v. Freeman, 5 Car. & P. 534; Johnson v. State, 9 Baxt. (Tenn.) 279.

[364] Rex v. Beacoll, 1 Car. & P. 457; Rex v. Rees, 6 Car. & P. 606.

[365] See 11 Am. & Eng. Enc. Law (2d Ed.) 1003-1006.

[366] Reg. v. Cosser, 13 Cox, C. C. 187; People v. Treadwell, 69 Cal. 226; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21; Com. v. Newcomer, 49 Pa. St. 478; Com. v. Young, 9 Gray (Mass.) 9.

[367] Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21.

[368] Watson v. State, 70 Ala. 13, 45 Am. Rep. 70.

A person may be an agent, and within the statute, though he may be paid by commissions out of the moneys received by him for his employer;[369] though he may receive no compensation at all;[370] and though he may be employed, not for any particular length of time, but for a particular occasion only.[371] One who assumes to act for another, when he has no authority in fact, and thereby receives money or property for or on account of the person for whom he assumes to act, is an agent *de facto*. He is estopped to deny authority to act, and is within the statute.[372]

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[369] Com. v. Foster, 107 Mass. 221, Beale's Cas. 715; Com. v. Smith, 129 Mass. 104; Campbell v. State, 35 Ohio St. 70; Morehouse v. State, 35 Neb. 643.

He must not have the right to mingle the money received for his principal with his own funds. Com. v. Stearns, 2 Metc. (Mass.) 343; Com. v. Foster, supra.

[370] State v. Barter, 58 N. H. 604; State v. Brooks, 85 Iowa, 366.

[371] Rex v. Smith, Russ. & R. 384; Pullan v. State, 78 Ala. 31, 56 Am. Rep. 21; State v. Barter, 58 N. H. 604; Com. v. Newcomer, 49 Pa. St. 478. Contra. Johnson v. State, 9 Baxt. (Tenn.) 279.

[372] People v. Treadwell, 69 Cal. 235; State v. Spaulding, 24 Kan. 1.

(*d*) *"Employes."*— Statutes sometimes punish embezzlement by "employes." Such a statute applies to any person who is employed by another, whatever may be the nature of the employment, and whether the relation arising therefrom be that of agent or servant.[373]

(*e*) *"Bailees."*[374] — In many jurisdictions statutes punish embezzlement by "bailees," or particular kinds of bailees, as common carriers, warehousemen, etc. Statutes punishing embezzlement by bailees have been held to apply to an inn-keeper in possession of a guest's baggage;[375] to a person to whom money was delivered by another to buy goods;[376] to a person to whom accepted orders for oil were delivered;[377] to an attorney employed to collect money, and to receive as compensation a certain percentage of the amount collected,[378] etc. But a person who

[373] State v. Foster, 37 Iowa, 404; Ritter v. State, 111 Ind. 324.

[374] See generally 10 Am. & Eng. Enc. Law (2d Ed.) 1007 et seq.

[375] People v. Husband, 36 Mich. 306.

[376] Reg. v. Aden, 12 Cox, C. C. 512.

[377] Hutchinson v. Com., 82 Pa. St. 472.

[378] Wallis v. State, 54 Ark. 611.

receives money or property for another does not necessarily become a bailee within the meaning of the statutes.[379] It has been held, for example, that the statute does not apply to a principal who has received a deposit of money from his agent, to insure the faithful discharge by the latter of his duties,[380] or to a person to whom an excessive payment of money has been made by mistake.[381] A person to whom goods are delivered upon a sale on condition that the title shall pass upon payment of the price is not a bailee.[382] Under some statutes, embezzlement can be committed by such bailees only as stand in a fiduciary relation to the bailor, and who receive the property exclusively for the benefit of the bailor. Such statutes do not apply where the property is held for the benefit of the bailee, as for hire.[383] The English statute has been held to apply only in the case of

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379 See Reg. v. Hoare, 1 Fost. & F. 647.

380 Mulford v. People, 139 Ill. 586.

381 Fulcher v. State, 32 Tex. Cr. R. 621.

382 Krause v. Com., 93 Pa. St. 418, 39 Am. Rep. 762.

383 Watson v. State, 70 Ala. 13, 45 Am. Rep. 70; Reed v. State, 16 Tex. App. 586.

bailments in which the specific property is to be returned to the bailor.[384]

348. The Conversion or Embezzlement.

The statutes vary somewhat in the terms used to designate the act by which embezzlement may be effected. They almost invariably require a conversion, and generally use the term "embezzle," which implies a conversion. To constitute a conversion, so as to make out a case of embezzlement, the owner must be deprived of his money or property by an adverse using or holding.[385] Mere secreting of property with intent to convert it is not enough.[386] Nor is it embezzlement merely to fail or refuse to pay a debt, whatever may be the motive by which the debtor is influenced.[387] To make a conversion em-

[384] Reg. v. Garrett, 8 Cox, C. C. 368; Reg. v. Hassall, 8 Cox, C. C. 491, Leigh & C. 58.

[385] State v. Hill, 47 Neb. 456; Chaplin v. Lee, 18 Neb. 440. See, also, Reg. v. Chapman, 1 Car. & K. 119; Penny v. State, 88 Ala. 105.

[386] McAleer v. State, 46 Neb. 116.

[387] People v. Hurst, 62 Mich. 276, Beale's Cas. 716; People v. Wadsworth, 63 Mich. 500; Collins v. State, 33 Fla. 429; Com. v. Foster, 107 Mass. 221; Kribs v. People, 82 Ill. 425; Mulford v. People, 139 Ill. 586; Com. v. Rockafellow, 163 Pa. St. 139.

bezzlement, no demand is necessary,[388] unless required by the statute.[389]

The means by which an embezzlement is accomplished are not material, so long as there is a conversion.[390] An agent may commit the crime by drawing a draft on his principal, payable to a third person, the same as though he received the money in person, if the principal pays the draft.[391] And the pledge of his principal's property by an agent is embezzlement if it was intrusted to him merely for safe-keeping, or for sale on commission.[392] Embezzlement may consist of

[388] Com. v. Tuckerman, 10 Gray (Mass.) 173; Com. v. Hussey, 111 Mass. 432; State v. Mason, 108 Ind. 48; Alderman v. State, 57 Ga. 367.

[389] A demand was held necessary under a statute making it embezzlement for any agent to neglect or refuse to deliver to his employer, "on demand," any money, etc. Wright v. People, 61 Ill. 382. And see State v. Murch, 22 Minn. 67; State v. Bancroft, 22 Kan. 170.

[390] Leonard v. State, 7 Tex. App. 417; State v. Ezzard, 40 S. C. 312.

Giving orders for grain in a warehouse. Calkins v. State, 18 Ohio St. 366, 98 Am. Dec. 121.

[391] Ex parte Hedley, 31 Cal. 109.

[392] Morehouse v. State, 35 Neb. 643.

a continuous series of acts of conversion.[393]

Authorized Acts.—A servant, agent, or bailee, who does with the property or money in his possession only what he is authorized to do by the terms of his employment, having no felonious intent, cannot be guilty of embezzlement.[394] But authority to sell property, or to otherwise deal with it, is no defense, and does not bar an indictment for embezzlement, if the agent, servant, or bailee converts the same or its proceeds to his own use with a fraudulent intent.[395] Where a bailee or agent has authority to sell property, and sells it, not for the purpose authorized, but with a fraudulent intent to appropriate it or its proceeds to his own use, he is guilty of embezzling the property itself as much as if he had no authority to sell, for the sale of the property with the fraudulent intent is a conversion.[396]

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[393] Brown v. State, 18 Ohio St. 497; Ker v. People, 110 Ill. 627, 51 Am. Rep. 706.

[394] Com. v. Smith, 129 Mass. 104; Miller v. State, 16 Neb. 179.

[395] Leonard v. State, 7 Tex. App. 417.

[396] Leonard v. State, 7 Tex. App. 417; State v. Adams, 108 Mo. 208.

If a bailee or agent, who has authority to sell

349. The Intent.

To constitute embezzlement, there must be, as in larceny,[397] a fraudulent intent to deprive the owner of his property.[398] If property is converted under a *bona fide* claim of right, an action for conversion may lie, but the conversion is not embezzlement, however unfounded the claim may be.[399] The

goods, sells them without any intent to defraud his principal, and after the sale fraudulently converts the proceeds, he is guilty of embezzling the proceeds, but not of embezzling the goods. Baker v. State, 6 Tex. App. 346; Leonard v. State, 7 Tex. App. 417.

[397] Ante, § 326 et seq.

[398] Reg. v. Creed, 1 Car. & K. 63; Reg. v. Balls, L. R. 1 C. C. 328; Reg. v. Norman, Car. & M. 501; People v. Galland, 55 Mich. 628; People v. Hurst, 62 Mich. 276, Beale's Cas. 716; Spalding v. People, 172 Ill. 40; Com. v. Tuckerman, 10 Gray (Mass.) 173; State v. Leonard, 6 Cold. (Tenn.) 307.

In State v. Baldwin, 70 Iowa, 180, it was said: "The crime of embezzlement embraces all of the elements of larceny except the actual taking of the property or money embezzled. It is the larceny of money or property rightfully in the possession of the party charged with the crime."

[399] Reg. v. Creed, 1 Car. & K. 63; Reg. v. Norman, Car. & M. 501; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Beaty v. State, 82 Ind. 228.

same is true in any other case of conversion by mistake, and without intent to defraud.[400]

III. CHEATS AND FALSE PRETENSES.

(A) Common-Law Cheats.

350. Definition.—Cheating, as a common-law offense, is the fraudulent obtaining of the property of another by any deceitful and illegal practice or token, not amounting to a felony, which is of such a nature that it directly affects, or may directly affect, the public at large.[401] Such a cheat is a misdemeanor at common law.

351. Indictable Cheats and Private Frauds Distinguished.

To render a cheat indictable at common law, the means by which it is accomplished must be such as affect or may affect the public at large, and not merely a single individual. The cheat must be of a public nature, and such that common prudence cannot guard against it. It is a misdemeanor at common law for a dealer to cheat a customer by using

[400] State v. Smith, 47 La. Ann. 432; Van Etten v. State, 24 Neb. 734.

[401] Steph. Dig. Crim. Law, art. 338; 2 East, P. C. 818; Rex v. Wheatly, 2 Burrows, 1125, 1 W. Bl. 273, Beale's Cas. 97. And see Middleton v. State, Dudley (S. C.) 275; State v. Renick (Or.) 56 Pac. 275.

false weights or measures,[402] or for a person to obtain another's money or property by means of a false token, if it be of such a nature as to be likely to deceive the public generally.[403] And a conspiracy to defraud is indictable at common law.[404] These are fraudulent practices which affect, or may affect, the public at large, and against which common prudence cannot guard.[405] But for a person to obtain another's money or property by a mere lie, or by a promise which he does not intend to perform, or by other prac-

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[402] Rex v. Wheatly, 2 Burrows, 1125, 1 W. Bl. 273, Beale's Cas. 97; Young v. Rex, 3 Term R. 104; Rex v. Dunnage, 2 Burrows, 1130; People v. Gates, 13 Wend. (N. Y.) 319.

[403] Reg. v. Mackarty, 2 Ld. Raym. 1179, 6 Mod. 301, 2 East, P. C. 823; Com. v. Speer, 2 Va. Cas. 65; State v. Stroll, 1 Rich. (S. C.) 244.

Selling goods with false marks on them, making them appear to be what they are not, is a common-law cheat. Reg. v. Closs, Dears. & B. 460, 7 Cox, C. C. 494; Rex v. Edwards, 2 East, P. C. 820; Rex v. Worrel, 2 East, P. C. 820; Respublica v. Powell, 1 Dall. (Pa.) 47.

[404] Reg. v. Mackarty, 2 Ld. Raym. 1179, 6 Mod. 301; 2 East, P. C. 823; Com. v. Warren, 6 Mass. 74; ante, § 144.

[405] Rex v. Wheatly, 2 Burrows, 1125, 1 W. Bl. 273, Beale's Cas. 97.

tices not affecting the public, is a mere private fraud, and is not indictable unless made so by statute.[406]

This distinction was clearly brought out in a leading English case,[407] in which a brewer was indicted for a cheat in delivering sixteen gallons of beer for and as eighteen gallons, which he had contracted to deliver, and obtaining pay for the latter amount. It was held that this was not an indictable offense. Lord Mansfield said: "That the fact here charged should not be considered as an indictable offense, but left to a civil

[406] Rex v. Wheatly, 2 Burrows, 1125, 1 W. Bl. 273, Beale's Cas. 97; Rex v. Lara, 2 Leach, C. C. 652, 2 East, P. C. 827, 6 Term R. 565; Reg. v. Eagleton, Dears. C. C. 376; Rex v. Bryan, 2 Strange, 866; Com. v. Warren, 6 Mass. 72; State v. Justice, 2 Dev. (N. C.) 199; People v. Miller, 14 Johns. (N. Y.) 371; People v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256; Ranney v. People, 22 N. Y. 413; Hartmann v. Com., 5 Pa. St. 60; Com. v. Hickey, 2 Pars. Sel. Cas. (Pa.) 317; Wright v. People, 1 Ill. 102; Middleton v. State, Dudley (S. C.) 275; People v. Garnett, 35 Cal. 470, 95 Am. Dec. 125; State v. Renick (Or.) 56 Pac. 275. Compare, as contra, Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441.

See, also, Steph. Dig. Crim. Law. art. 338.

[407] Rex v. Wheatly, supra.

remedy by an action, is reasonable and right in the nature of the thing, because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not. The offense that is indictable must be such a one as affects the public, as if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing; so, if a man defrauds another, under false tokens; for these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat; for ordinary care and caution is no guard against this. Those cases are much more than mere private injuries; they are public offenses. But here it is a mere private imposition or deception. No false weights or measures are used, no false tokens given, no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater, which the other carelessly accepted. 'Tis only a nonperformance of his contract, for

which nonperformance he may bring his action." [408]

(B) False Private Tokens.

352. In General.—To fraudulently obtain property by means of a false token not of such a nature as to affect the public generally was not an offense at common law, but it has been made so in some jurisdictions by statute.

353. Common Law.

At common law, as we have seen, it was an indictable offense to cheat by means of false tokens of such a nature as to deceive or affect

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[408] In Reg. v. Jones, 2 Ld. Raym. 1013, 1 Salk. 379, the defendant had obtained money from the prosecutor by pretending to be sent for it by a person who had not sent him. The court said: "It is not indictable, unless he came with false tokens. We are not to indict one man for making a fool of another; let him bring his action." And see Rex v. Bryan, 2 Strange, 866.

The giving of a check on a bank by one who has no account there, and falsely representing that it is good, is not a common-law cheat. Rex v. Lara, 2 Leach, C. C. 647, 2 East, P. C. 819.

It is not an indictable cheat at common law to obtain money or goods by means of a fraudulent promise to send a pledge, or to pay. See Nehuff's Case, 1 Salk. 151; Hartmann v. Com., 5 Pa. St. 60.

Nor is it cheating at common law to induce another to purchase a promissory note that has

the public at large.[409] It was not an offense, however, to use mere private tokens.[410]

354. Statutes.

This was changed in England by the statute of 33 Hen. VIII. c. 1, making all cheats by false tokens indictable, whether of a public or a private nature.[411] This statute is old enough to be a part of our common law, and has been recognized as in force in some of the states,[412] though not in all.[413] In some states similar statutes have been enacted.[414]

To constitute a false token within the meaning of such a statute, there must be something more than a mere verbal lie.

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been paid, by falsely and fraudulently representing that it is unpaid. Middleton v. State, Dudley (S. C.) 275.

[409] Ante, §§ 350, 351.

[410] Rex v. Lara, 2 Leach, C. C. 652, 2 East, P. C. 819, 6 Term R. 565; State v. Renick (Or.) 56 Pac. 275.

[411] See 3 Chit. Crim. Law, 996.

[412] Com. v. Warren, 6 Mass. 72.

[413] Com. v. Hutchinson, 1 Clark (Pa.) 250.

[414] In some states, the statute is somewhat broader, punishing the obtaining of property "by color of any false token or writing." See Jones v. State, 50 Ind. 473; People v. Gates, 13 Wend. (N. Y.) 320.

There must be something real and visible, as a ring, a key, a seal or other mark, or some writing.[415] And it has been held that even a writing will not suffice unless it be in the name of another than the accused, or be so framed as to afford more credit than the mere assertion of the party defrauding.[416]

It has been said that a statute punishing the obtaining of property by "color of any false token or writing" applies whenever the fraud is effected by making a token or writing appear to be different from what it really is, or by representing a false token or a false writing to be genuine.[417]

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[415] 3 Chit. Crim. Law, 997. And see Tatum v. State, 58 Ga. 409; State v. Renick (Or.) 56 Pac. 275; State v. Delyon, 1 Bay (S. C.) 353.

The statute against obtaining property by false tokens does not apply where a person induces another to buy a blind horse by falsely representing that it is sound. State v. Delyon, supra. And see Tatum v. State, supra.

Nor does it apply where a man assumes a fictitious name, and represents that he is unmarried, and by this means, together with a promise to marry, obtains money from a woman. State v. Renick, supra.

[416] 3 Chit. Crim. Law, 997, citing 2 East, P. C. 689.

[417] Wagoner v. State, 90 Ind. 504. And see Jones v. State, 50 Ind. 473.

The writing must purport to be the act of some

(C) False Pretenses.

355. In General.—To obtain property by mere false and fraudulent representations, without the use of false weights, measures, or tokens, was not an offense at common law, but in most jurisdictions it is now punished by statute. The statutes vary somewhat in their terms, but they all, in substance, punish the fraudulent obtaining of the property of another by any false pretense. To constitute this offense:

1. **The pretense may be made either by written or spoken words, or by conduct alone.**
2. **There must be something more than mere failure to disclose facts.**
3. **The pretense must be a representation of a fact as existing or as having existed. It must not be—**
   - **(a) A statement as to future events, as a prediction, or a statement of intention or expectation.**
   - **(b) A mere promise.**
   - **(c) A mere expression of opinion or belief.**
   - **(d) Mere dealers' talk or puffing.**
4. **The pretense must be false, and it must be so at the time the property is obtained.**

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person, at least. Therefore, a writing in the form of a note or bond, but which has no signature, and does not purport to have a signature, is not within the statute. People v. Gates, 13 Wend. (N. Y.) 320.

The statute does not apply where a genuine writing is used to perpetrate a fraud. Shaffer v. State, 82 Ind. 221.

5. It must be reasonably calculated to deceive, but it must be considered with reference to the capacity and condition of the particular person to whom it is made.
6. It must be made—
   (a) With knowledge that it is false.
   (b) With intent to defraud.
   (c) With intent to deprive the owner wholly of his property.
7. It must deceive the person to whom it is made. Therefore, it must be relied upon by him, and be a direct and proximate cause of his parting with the property. But it need not be the sole inducement.
8. By the weight of authority, negligence of the person defrauded is no defense.
9. The pretense must result in the obtaining of the property. Therefore,
   (a) The Property must be actually obtained.
   (b) The property, as distinguished from the mere possession, must be parted with.
10. The person to whom the pretense is made must be defrauded. Injury must be sustained.
11. The thing obtained must be within the terms of the statute.

Reason for the Statutes.—The statutes punishing as a crime the obtaining of another's property by false pretenses were intended to remedy two supposed defects in the common law. As has just been shown,

it is not an indictable cheat at common law to fraudulently obtain money or goods from another by mere false pretenses, without the use of any false token, weight, or measure.[418] Nor does it amount to larceny where the owner intends to part with his *property* in the money or goods.[419] It is to reach these cases that the statutes were originally enacted.

The English Statutes.—The original English statute was that of 30 Geo. II. c. 24, which made it a criminal offense for any person to "knowingly and designedly, by false pretense or pretenses, * * * obtain from any person or persons money, goods, wares, or merchandise, with intent to cheat or defraud any person or persons of the same." After this came the statute of 7 & 8 Geo. IV. c. 30, § 53, punishing any person who should "by any false pretense obtain from any other person any chattels, money, or valuable security, with intent to cheat or defraud any person of the same." This language was also adopted by the present statute of 24 & 25 Vict. c. 96, § 88.

[418] Ante, § 351.

[419] Ante, § 318.

The Statutes in the United States. — In this country the statutes vary in the different states. Many of them follow the English statute of Geo. II., but some are broader.[420]

356. The False Pretense—In General.

To constitute the offense of obtaining property by a false pretense, it is clear that some pretense must be made.[421] The statutes, however, do not require that any false token shall be used. A mere lie or false representation is sufficient.[422] A pretense, within the meaning of the statutes, is a representation of a fact as existing or as having existed in the past.[423]

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[420] See, generally, Ranney v. People, 22 N. Y. 413; State v. Vanderbilt, 27 N. J. Law, 328.

[421] See Reg. v. Jones [1898] 1 Q. B. 120; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744.

[422] Reg. v. Woolley, 3 Car. & K. 98, 1 Den. C. C. 559, 4 Cox, C. C. 193; Young v. Rex, 3 Term R. 98; Com. v. Burdick, 2 Pa. St. 164, 44 Am. Dec. 186; People v. Johnson, 12 Johns. (N. Y.) 292; State v. Vanderbilt, 27 N. J. Law, 328.

[423] Reg. v. Hazelton, L. R. 2 C. C. 134; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Jackson v. People, 126 Ill. 139; People v. Johnson, 12 Johns. (N. Y.) 292; Taylor v. Com., 94 Ky. 281; People v. Reynolds, 71 Mich. 348; People v. Jordan,

357. How the Pretense may be Made.

The false representation or pretense may be, and generally is, verbal or in writing,[424] but it need not be so. It may be by conduct alone, without any words at all, either written or spoken.[425] Thus, in a leading English case it was held that an indictment would lie under the statute against a person who had fraudulently obtained goods from a tradesman at Oxford by wearing a cap and gown, and thus by his conduct giving the impression that he was a member of the University.[426] The principle also applies where a

66 Cal. 13, 56 Am. Rep. 73; Com. v. Moore, 99 Pa. St. 574; State v. Moore, 111 N. C. 672.

[424] It may be by means of an advertisement in a newspaper, or elsewhere. See Jackson v. People, 126 Ill. 139; Reg. v. Cooper, 1 Q. B. Div. 19, 13 Cox, C. C. 123.

[425] Rex v. Barnard, 7 Car. & P. 784, Beale's Cas. 727; Reg. v. Bull, 13 Cox, C. C. 608; Rex v. Story, Russ. & R. 80; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271; Blum v. State, 20 Tex. App. 592, 54 Am. Rep. 530; State v. Wilkerson, 98 N. C. 696; Com. v. Wallace, 114 Pa. St. 412, 60 Am. Rep. 353.

[426] Rex. v. Barnard, 7 Car. & P. 784, Beale's Cas. 727.

It is a false pretense for a person to present

man obtains money or goods by giving a worthless check, knowing that he has no funds in the bank, and having no reason to suppose that the check will be paid.[427]

358. Nondisclosure of Facts.

Mere silence or failure to disclose facts can rarely, if ever, amount to a false pretense, provided there is no such conduct as to amount to a representation. Thus, it has been held that an indictment will not lie against an insolvent person for purchasing goods on credit without disclosing the fact of his insolvency, if there is no misrepre-

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a money order for payment at the postoffice, and falsely assume to be the person mentioned in the order, though he may not make any verbal false representation. Rex v. Story, Russ. & R. 80.

The presentation of a bank note as good, knowing that the bank by which it was issued has stopped, is a false pretense by conduct. Per Crompton, J., in Evan's Case, Bell, C. C. 192.

[427] Reg. v. Hazelton, L. R. 2 C. C. 134; Rex v. Jackson. 3 Camp. 370; Lesser v. People, 73 N. Y. 78; Barton v. People, 135 Ill. 409, 25 Am. St. Rep. 375; Com. v. Wallace, 114 Pa. St. 412, 60 Am. Rep. 353; Com. v. Devlin, 141 Mass. 430.

Giving a postdated check or bill of exchange may be a false pretense. Rex v. Parker, 7 Car. & P. 825, 2 Mood. C. C. 1; Reg. v. Hughes, 1 Fost. & F. 355.

sentation as to his condition.[428] Mere nondisclosure must be distinguished from false representation by conduct.[429]

359. Statements as to Future Events and Promises.

(*a*) *In General.*—It has been repeatedly held that predictions, or other statements as to future events, not being representations as to existing or past facts, are not false pretenses within the meaning of the statutes, even though the person making them may believe or know that they will not be fulfilled.[430] Thus, it has been held that an indictment will not lie against a person who obtains money or property from another by falsely stating that the other's property is about to be attached.[431]

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[428] Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

[429] See ante, § 357, and the cases there referred to.

[430] Rex v. Bradford, 1 Ld Raym. 366; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; State v. Kingsley, 108 Mo. 135; Ranney v. People, 22 N. Y. 413; People v Blanchard, 90 N. Y. 314; Com. v. Burdick, 2 Pa. St. 164, 44 Am. Dec. 186; Burrow v. State, 12 Ark. 65. Compare In re Greenough, 31 Vt. 290.

[431] Burrow v. State, 12 Ark. 65.

(*b*) *Statements of intention or expectation,* since they relate to the future, are not false pretenses, within the meaning of the statutes, even though the person making them may not intend or expect what he says, and though he may make the statements fraudulently.[432] Thus, it has been held that an indictment will not lie under these statutes against a man who obtains money from a woman by falsely stating that he intends to marry her,[433] or against a person who obtains board at a hotel by falsely telling the proprietor that he expects a check at a certain time;[434] or against a person who obtains money or property by false statements as to the purpose for which he intends to use it.[435]

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[432] Reg. v. Woodman, 14 Cox, C. C. 179; Reg. v. Lee, Leigh & C. 309, 9 Cox, C. C. 304; Reg. v. Johnston, 2 Mood. C. C. 254; Com. v. Moore, 99 Pa. St. 574; State v. Kingsley, 108 Mo. 135; Com. v. Warren, 94 Ky. 615.

[433] Reg. v. Johnston, 2 Mood. C. C. 254.

[434] State v. Kingsley, 108 Mo. 135.

[435] Reg. v. Lee, Leigh & C. 309, 9 Cox, C. C. 304; Reg. v. Woodman, 14 Cox, C. C. 179; State v. Deday, 93 Mo. 98; Com. v. Warren, 94 Ky. 615.

In Reg. v. Lee, 9 Cox, C. C. 304, Leigh & C. 309, the prosecutor lent £10 to the prisoner, on the

(c) *Promises,* like predictions and statements of intention, relate to the future, and they do not fall within the statutes against false pretenses, even when they are made with fraudulent intent, and with the intention of not performing them.[436] Thus, it has been held that the statutes do not apply to the obtaining of money or property by a promise to pay in the future,[437] or to send

false pretense that he was going to pay his rent, and testified that if the prisoner had not told him that he was going to pay his rent he would not have lent the money. It was held that this was not a false pretense of any existing fact, and that a conviction could not be sustained.

[436] Rex v. Goodhall, Russ. & R. 461, Beale's Cas. 725; Rex v. Bradford, 1 Ld. Raym. 366; Ranney v. People, 22 N. Y. 413; Com. v. Moore, 89 Ky. 542; State v. Kingsley, 108 Mo. 135; Com. v. Burdick, 2 Pa. St. 164, 44 Am. Dec. 186; Strong v. State, 86 Ind. 210, 44 Am. Rep. 292; State v. Magee, 11 Ind. 154; Dillingham v. State, 5 Ohio St. 280; State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271.

"Any representation or assurance in relation to a future transaction may be a promise or covenant or warranty, but cannot amount to a statutory false pretense." Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744.

[437] Rex v. Goodhall, Russ. & R. 461, Beale's Cas. 725; People v. Tompkins, 1 Park. Cr. R. (N. Y.) 238.

or furnish goods,[438] or to marry,[439] or to procure employment.[440]

(*d*) *Statements as to Future Events Accompanied by Statements of Fact.*—If a statement as to future events, as a prediction, promise, or statement of intention, is accompanied by a false representation as to an existing or past fact, and this representation is relied upon, and is one of the inducements for parting with the property, an indictment will lie,[441] for a pretense, to come within the

[438] State v. Haines, 23 S. C. 170.

[439] Reg. v. Johnston, 2 Mood. C. C. 254.

[440] Ranney v. People, 22 N. Y. 413. But see post, § 359d, note 441.

[441] Reg. v. Bates, 3 Cox, C. C. 201; Rex v. Asterley, 7 Car. & P. 191; Reg. v. West, Dears. & B. C. C. 575, 8 Cox, C. C. 12; Reg. v. Jennison, Leigh & C. 157, 9 Cox, C. C. 158, Beale's Cas. 742; Reg. v. Speed, 15 Cox, C. C. 24; Com. v. Wallace, 114 Pa. St. 413, 60 Am. Rep. 353; Boscow v. State, 33 Tex. Cr. R. 390; State v. Thaden, 43 Minn. 326; Donohoe v. State, 59 Ark. 377; Com. v. Moore, 89 Ky. 542.

Thus, the statute applies where a person obtains money from another, not only by pretending that he will cure a disease, but also by falsely representing that he is a regular physician, and a member of a medical institute. Boscow v. State, supra.

The same is true where a promise to procure

statute, need not be the sole inducement.[442] In such a case, however, the indictment is based upon the false representation of fact, and not upon the prediction, promise, or statement of intention. If the former is not relied upon, and the latter is the sole inducement, an indictment will not lie.[443]

360. Expression of Opinion or Belief.

A mere expression of opinion or belief is not a false pretense within the statutes. And it can make no difference that the opinion expressed is not in fact entertained.[444]

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a position for another is accompanied by a false representation of ability to do so, or a false representation that there is a certain position open. People v. Winslow, 39 Mich. 507; Com. v. Parker, Thach. C. C. (Mass.) 24. Ranney v. People, 22 N. Y. 413, which is to the contrary, cannot be sustained.

The same is true where a man's promise to furnish a house and marry a woman is accompanied by a false representation that he is a single man. Reg. v. Jennison, Leigh & C. 157, 9 Cox, C. C. 158, Beale's Cas. 742.

[442] Post, § 365c.

[443] People v. Tompkins, 1 Park. Cr. R. (N. Y.) 238.

[444] People v. Jacobs, 35 Mich. 36; Com. v. Stevenson, 127 Mass. 448; People v. Gibbs, 98 Cal. 661;

For example, it has been held that an indictment cannot be maintained for a fraudulent expression of opinion as to the value of property,[445] or as to the wealth of a person,[446] or for a statement that land is "nicely located."[447] This rule does not apply, however, where a statement, though in the form of an opinion, really involves a statement as to existing or past facts.[448]

361. "Dealers' Talk" or "Puffing."

The statutes are not intended to cover statements known as "dealers' talk" or "puffing," or mere exaggerated statements by the seller of land or goods as to the quality or value thereof, made for the purpose of inducing another to buy them, for such statements are to be expected, and persons are

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Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; Rothschild v. State, 13 Lea (Tenn.) 300; State v. Daniel, 114 N. C. 823.

[445] Com. v. Wood, 142 Mass. 461; People v. Gibbs, 98 Cal. 661; People v. Jacobs, 35 Mich. 38. Compare People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73.

[446] Com. v. Stevenson, 127 Mass. 448. And see Rothschild v. State, 13 Lea (Tenn.) 300.

[447] People v. Jacobs, 35 Mich. 36.

[448] People v. Peckens, 153 N. Y. 576.

not supposed to rely upon them.[449] There is a point, however, beyond which a seller of land or goods cannot go. If he fraudulently makes a positive false representation of fact as to the quality or condition of an article, or of the quality or location, etc., of land, to induce another to purchase it, he may render himself liable to indictment.[450]

362. Falsity of Pretense.

To constitute the offense of obtaining property by a false pretense, the pretense must be false. The offense is not committed by one who obtains another's property by means of a pretense which is true, though he may believe it is false,[451] for the law does

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[449] Reg. v. Bryan, Dears. & B. C. C. 265, 7 Cox, C. C. 313, Beale's Cas. 729 (as to which see Steph. Dig. Crim. Law, p. 273, note 3); People v. Morphy, 100 Cal. 84; State v. Heffner, 84 N. C. 752.

[450] See Reg. v. Goss, Bell, C. C. 208, 8 Cox, C. C. 264, Beale's Cas. 737; Reg. v. Ardley, L. R. 1 C. C. 301, 12 Cox C. C. 23; Reg. v. Roebuck, Dears. & B. C. C. 24, 7 Cox, C. C. 126; State v. Stanley, 64 Me. 157; Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397; State v. Burke, 108 N. C. 750; People v. Bryant, 119 Cal. 595.

[451] State v. Asher, 50 Ark. 427, Beale's Cas. 229;

not undertake to punish a mere criminal intent.[452] It is also necessary that the pretense shall be false, not only when made, but also when the property is obtained.[453] When several pretenses are made, the fact that some of them are true will not prevent an indictment, if the person to whom they are made is partly influenced by those which are false.[454]

363. Pretenses not Calculated to Deceive.

It has been held that the pretense, to come within the statute, must be made under such circumstances, and be of such a character, as to reasonably deceive,[455] and that it

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State v. Garris, 98 N. C. 733; People v. Reynolds, 71 Mich. 348.

Thus, it was held in State v. Garris, supra, that an indictment could not be maintained against a person who, with intent to defraud, and believing his statement to be false, represented that a crop was not mortgaged, where a mortgage which was intended to cover the crop failed to do so because of a defect in the description.

[452] Ante, §§ 116-118.

[453] See In re Snyder, 17 Kan. 555, 2 Am. Cr. R. 238.

[454] Reg. v. Lince, 28 Law Times (N. S.) 570.

[455] Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Watson v. People, 87 N. Y. 566, 41 Am.

must not be clearly absurd or unreasonable.[456] In determining, however, in any particular case, whether the pretense was calculated to deceive, the intelligence and other circumstances of the person to whom it was made must be taken into consideration, the question being whether it was calculated to deceive him.[457] As was said in an Ohio case: "Even persons deprived of ordinary discretion, children, or idiots are entitled to the protection of the laws, and a man who is ineffably dull may not for that reason alone be robbed with impunity." [458]

Rep. 397; State v. Estes, 46 Me. 150; Cowen v. People, 14 Ill. 348; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; Canter v. State, 7 Lea (Tenn.) 349.

[456] Watson v. People, supra; Woodbury v. State, supra; Com. v. Drew, supra; State v. Vanderbilt, 27 N. J. Law, 328.

[457] Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71, and other cases cited in the note following.

[458] Bartlett v. State, 28 Ohio St. 669.

There are some cases in which it has been said that the pretense must be such as is calculated to impose upon a person of ordinary prudence and caution. See Com. v. Grady, 13 Bush (Ky.) 285, 26 Am. Rep. 192; People v. Williams, 4 Hill (N. Y.) 9, 40 Am. Dec. 258; Com. v. Hickey, 2 Pars.

That the existence of the alleged fact was impossible is immaterial, if the person to whom the representation was made believed it and relied upon it in parting with his

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Sel. Cas. (Pa.) 317; State v. Magee, 11 Ind. 154. But this view is not sound. By the overwhelming weight of authority, the test is whether the pretense was calculated to deceive the particular person to whom it was made, and not whether it was calculated to deceive persons of ordinary intelligence, prudence, and caution. Watson v. People, 87 N. Y. 564, 41 Am. Rep. 397; Reg. v. Woolley, 3 Car. & K. 98, 1 Den. C. C. 559, 4 Cox, C. C. 193; People v. Sully, 5 Park. Cr. R. (N. Y.) 166; Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71; Com. v. Henry, 22 Pa. St. 256; State v. Vanderbilt, 27 N. J. Law, 332; Johnson v. State, 36 Ark. 242; Cowen v. People, 14 Ill. 352; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515. And see Reg. v. Wickham, 10 Adol. & E. 34.

"The object and purpose of the law is to protect all persons alike, without regard to the single capacity to exercise ordinary caution, a condition of mind very difficult of definition, and certainly of very different meaning under the various circumstances that may surround the person proposed to exercise it. * * * If 'ordinary caution' is to have its influence in the application of the law, it must be such ordinary caution as we may naturally and reasonably expect to exist under the circumstances and conditions of life of the person practiced upon. The question is, what

property. Thus, representations by a person that he is possessed of supernatural powers, and the like, may be false pretenses.[459]

caution is he capable of exercising? The main object of the law is to protect the weak against the strong, the inexperienced and unsuspecting against the experienced and vicious. There can be no rule of law caring more for the protection of the wise and cultivated than for the foolish and unlettered. It is not required that one should exercise more caution and prudence than nature has given him." Bowen v. State, 9 Baxt. (Tenn.) 45, 50. In this case, an indictment and conviction was sustained for very absurd representations, by which an ignorant and superstitious negro was imposed upon.

[459] Reg. v. Giles, Leigh & C. 502, 10 Cox, C. C. 44; Reg. v. Lawrence, 36 Law Times (N. S.) 404; Bowen v. State, 9 Baxt. (Tenn.) 45.

In Reg. v. Lawrence, supra, the defendant was convicted of attempting to obtain money upon the false pretense that he had power to communicate with the spirits of deceased and other persons, although such persons were not present in the place where he then was; and also that he had power to produce and cause to be present such spirits as aforesaid in a materialized or other form; and also that divers musical instruments produced sounds by the sole means of such spirits. It was held that he was thereby charged with falsely pretending an existing fact, and that the indictment so alleging was good.

364. The Intent.

(*a*) *Knowledge That the Representation is False.*—In some states the statute expressly requires that the person making the representation shall know that it is false. Even when the statute does not expressly so require, it is assumed that the legislature did not intend to dispense with the necessity for a criminal intent, and knowledge that the representation is false is held to be an essential element of the offense.[460]

(*b*) *Intent to Defraud.*—It is also necessary that the false representation shall be made with intent to defraud.[461] For this

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[460] Watson v. People, 87 N. Y. 564, 41 Am. Rep. 397; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Com. v. Jeffries, 7 Allen (Mass.) 548; State v. Hurst, 11 W. Va. 59; People v. Getchell, 6 Mich. 496; People v. Behee, 90 Mich. 356; State v. Alphin, 84 N. C. 745. As to the presumption of knowledge, see Jackson v. People, 126 Ill. 139.

[461] Rex v. Williams, 7 Car. & P. 354; People v. Getchell, 6 Mich. 496; Com. v. Drew, 19 Pick. (Mass.) 179; Com. v. Van Tuyl, 1 Metc. (Ky.) 1, 71 Am. Dec. 455; Therasson v. People, 82 N. Y. 239; Watson v. People, 87 N. Y. 564, 41 Am. Rep. 397; People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73; Blum v. State, 20 Tex. App. 592, 54 Am. Rep. 530; People v. Wakely, 62 Mich. 303.

reason, among others, it has been held that a person is not guilty of this offense in inducing another to pay a debt that is honestly due, although he may do so by means of a pretense which he knows to be false.[462] If a person, however, obtains money or goods by false pretenses, he is none the less guilty because he intends to repay the money or pay for the goods,[463] for "an intent to defraud is consistent with an intent to undo the effect of the fraud if the offender should be able to do so."[464] That there is ability as well as intent to repay is no defense.[465] Even an offer to repay or actual repayment is no defense.[466]

(*c*) *Intent to Deprive the Owner of His Property.*—To constitute the obtaining of

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[462] Rex v. Williams, 7 Car. & P. 354; People v. Thomas, 3 Hill (N. Y.) 169, Beale's Cas. 722; post, § 368a.

[463] Reg. v. Naylor, L. R. 1 C. C. 4, 10 Cox, C. C. 151; Com. v. Schwartz, 92 Ky. 510, 36 Am. St. Rep. 609; People v. Oscar, 105 Mich. 704; Com. v. Coe, 115 Mass. 501.

[464] Steph. Dig. Crim. Law, art. 332.

[465] State v. Thatcher, 35 N. J. Law, 445.

[466] Donohoe v. State, 59 Ark. 378, and cases cited in the second preceding note. And see ante, § 156.

property by false pretenses, it is essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property in the thing obtained. The offense is not committed where the intent is merely to deprive him of the temporary possession and use.[467]

365. The Pretense as the Inducement.

(*a*) *In General.*—A man cannot be said to obtain another's property by a false pretense, unless the pretense is at least one of the inducements for the other's parting with the property. There must not only be a false and fraudulent pretense, but it is also necessary that the property shall be obtained *by means* of the pretense. The offense, therefore, is not committed if the other party does not rely upon the pretense, but makes independent inquiries or examination, and

[467] Reg. v. Kilham, L. R. 1 C. C. 261, 11 Cox, C. C. 561, Beale's Cas. 718. In this case, the prisoner, by falsely pretending to a liveryman that he was sent by another person to hire a horse for him for a drive to a certain place, obtained the horse. He returned the horse the same evening, but did not pay for the hire. It was held that this was not obtaining property by false pretenses. The case of Reg. v. Boulton, 1 Den. C. C. 508, was distinguished.

acts upon his own judgment, or upon other considerations.[468] Nor is it committed if he knows or believes that the pretense is false,[469] or if the pretense is not made until after the property has been obtained.[470]

(*b*) *Remoteness of Pretense.*—It is also necessary that the pretense shall be a direct

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[468] Rex v. Dale, 7 Car. & P. 352; Reg. v. Mills, Dears. & B. C. C. 205, 7 Cox, C. C. 263, Beale's Cas. 727; Com. v. Drew, 19 Pick. (Mass.) 179; Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397; Blum v. State, 20 Tex. App. 578, 54 Am. Rep. 530; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103; Morgan v. State, 42 Ark. 131, 48 Am. Rep. 55; Bowler v. State, 41 Miss. 578; People v. McAllister, 49 Mich. 12; State v. Dowe, 27 Iowa, 273, 1 Am. Rep. 271; State v. Green, 7 Wis. 676; People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73; People v. Gibbs, 98 Cal. 661; Fay v. Com., 28 Grat. (Va.) 918; State v. Hurst, 11 W. Va. 59.

[469] Reg. v. Mills, Dears. & B. C. C. 205, 7 Cox, C. C. 263, Beale's Cas. 727; Reg. v. Hensler, 11 Cox, C. C. 570.

[470] Reg. v. Brooks, 1 Fost. & F. 502; Reg. v. Jones, 15 Cox, C. C. 475; State v. Moore, 111 N. C. 672; State v. Willard, 109 Mo. 242.

In Reg. v. Brooks, supra, a carrier, having ordered a cask of ale, said, after he had possession of it, "This is for W." It was held that an indictment for obtaining it by falsely pretending that he was sent for it by W. could not be sustained.

or proximate inducement or cause of parting with the property, and not a remote cause.[471] For this reason there are cases in which it has been held that obtaining goods from a person under a contract into which he was induced to enter by false pretenses was not indictable.[472] The mere fact, however, that

[471] Reg. v. Larner, 14 Cox, C. C. 497; Reg v. Gardner, Dears. & B. C. C. 40, 7 Cox, C. C. 136; Watson v. People, 27 Ill. App. 496. And see Wagoner v. State, 90 Ind. 507.

[472] Thus, where a person, by falsely representing himself to be a naval officer, induced another to enter into a contract with him for lodging, and several days afterwards became a boarder also, it was held that an indictment would not lie against him for obtaining the board by a false pretense. The obtaining of the board, it was held, was too remotely connected with the pretense. Reg. v. Gardner, Dears. & B. C. C. 40, 7 Cox, C. C. 136. See, also, Reg. v. Bryan, 2 Fost. & F. 567.

In an English case, the prisoner was charged with obtaining a prize in a certain swimming race by false pretenses. He obtained his competitor's ticket for the race by representing himself to be a member of a certain club, and by a letter purporting to be written by the secretary of that club. On the faith of these representations, which turned out to be false, he was allowed twenty seconds' start in the race, and won the prize. It was held that the false pretenses were

goods are obtained under contract by means of false pretenses does not necessarily render the pretense too remote. The statute applies, for instance, when a man fraudulently induces another by false pretenses to sell and deliver goods on credit. The fact that there is a contract does not render the pretenses too remote.[473]

(*c*) *Other Inducements Contributing.*— By the overwhelming weight of authority it

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too remote, and that the count charging them could not be sustained. Reg. v. Larner, 14 Cox, C. C. 497.

[473] Reg. v. Abbott, 1 Den. C. C. 273, 2 Car. & K. 630, 2 Cox, C. C. 430; Reg. v. Dark, 1 Den. C. C. 276; Reg. v. Willot, 12 Cox, C. C. 68; Com. v. Lee, 149 Mass. 179; People v. Martin, 102 Cal. 558. And see Smith v. State, 55 Miss. 521.

On this point, see Steph. Dig. Crim. Law, art. 331, and the illustrations there given.

If there is any distinction between obtaining goods by a false pretense directly made, and obtaining goods at several times under a contract into which the seller has been entrapped by a false pretense, it has no force in a case where, the goods being obtained at different times, the accused at each time repeated the false pretense. In such a case, the sale of the goods will be referred to the false pretense thus repeated, rather than to the contract. Smith v. State, 55 Miss. 513.

is not at all necessary that the false pretense shall be the sole inducement for parting with the property, or even that it shall be the main inducement. If it is relied upon, and is one of the inducements, an indictment will lie, however many other inducements may contribute.[474] And it can make no difference that the property would not have been parted with except for the other inducements.[475]

(*d*) *Lapse of Time—Continuing Pretense.*—An indictment will lie for obtaining property by a false pretense, notwithstanding

[474] Reg. v. Jennison, Leigh & C. 157, 9 Cox, C. C. 158, Beale's Cas. 742; Fay v. Com., 28 Grat. (Va.) 912; Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Com. v. Lee, 149 Mass. 179; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; In re Snyder, 17 Kan. 554; State v. Thatcher, 35 N. J. Law, 445; People v. Miller, 2 Park. Cr. R. (N. Y.) 199; People v. Oyer & Terminer Court, 83 N. Y. 453; State v. Conner, 110 Ind. 471. See ante, § 359d.

"It is sufficient if the jury are satisfied that the unlawful purpose would not have been effected without the influence of the false pretense, added to any other circumstances which might have contributed to control the will of the injured party." State v. Thatcher, supra.

[475] Com. v. Lee, 149 Mass. 179.

the lapse of time between the making of the pretense and the obtaining of the money, if the pretense is relied upon and intended to be relied upon, for it may be considered as continuing.[476] The lapse of time, however, may be considered in determining whether the pretense was in fact relied upon.[477]

[476] Reg. v. Greathead, 38 Law Times (N. S.) 691, 14 Cox, C. C. 108; Reg. v. Welman, Dears. C. C. 188. And see State v. House, 55 Iowa, 473; Com. v. Lee, 149 Mass. 179.

In an English case, the prisoner, by means of a false-wages sheet, obtained from his master a check for the amount stated in the sheet to pay the men's wages. The check was informally drawn, and refused payment by the bank. The prisoner returned it to his master, telling him of the cause of its nonpayment, and the master tore it up, and gave another. This the prisoner cashed, and he appropriated the difference between what was really due for wages and what was falsely stated to be due. On an indictment charging him with obtaining money by false pretenses, it was objected that this evidence did not prove the charge, as he had only obtained a valueless piece of paper. It was held, however, that the false pretense was a continuing one, and that the second valuable check was obtained thereby equally with the first, and that the charge was proved. Reg. v. Greathead, supra.

[477] See Reg. v. Gardner, Dears. & B. C. C. 40, 7 Cox, C. C. 136.

366. Negligence of the Person Defrauded.

It has been held in some cases that negligence of the person defrauded in relying upon the false pretense may prevent the obtaining of the property from him from being indictable, as where he has equal means of knowing or ascertaining the truth.[478] But the soundness of this view is very doubtful. One who perpetrates a fraud upon another by a representation which he knows to be false should not be allowed to say, either in a civil or a criminal case, that the other was guilty of negligence in believing him; and there are a number of cases in which this view has been taken.[479]

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[478] Com. v. Drew, 19 Pick. (Mass.) 179, Beale's Cas. 744; Com. v. Norton, 11 Allen (Mass.) 266, Beale's Cas. 750; Com. v. Grady, 13 Bush (Ky.) 285, 26 Am. Rep. 192; Woodbury v. State, 69 Ala. 242, 44 Am. Rep. 515; Buckalew v. State, 11 Tex. App. 352.

[479] See Reg. v. Woolley, 3 Car. & K. 98, 1 Den. C. C. 559, 4 Cox, C. C. 193; Reg. v. Jessop, Dears. & B. C. C. 442, 7 Cox. C. C. 399; Com. v. Mulrey, 170 Mass. 103; Thomas v. People, 113 Ill. 537.

In Reg. v. Woolley, supra, the secretary of an Odd Fellows' lodge told a member that he owed a certain sum, and thereby obtained that sum from him, whereas he owed a less sum. It was held that

367. The Obtaining of the Property.

(*a*) *In General.*—To constitute the offense of obtaining property by a false pretense, the property must be actually obtained.[480] Otherwise, it is at the most an attempt only.

(*b*) *The Property, and not Merely the Possession, must be Obtained.*—It was shown in a preceding section that, to constitute an obtaining of property by false pretenses, it is essential that there shall be an intention to deprive the owner *wholly* of his *property* in the chattel, and the offense is not committed where the intent is merely to obtain the temporary possession and use.[481]

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this was a false pretense, within the statute, though the truth might easily have been ascertained by inquiry.

And in Reg. v. Jessop, supra, a person who fraudulently offered a £1 bank note as a note for £5, and obtained change as for a £5 note, was held guilty of obtaining money by false pretenses, though the other person could read, and the note itself, upon the face of it, clearly afforded the means of detecting the fraud.

[480] Rex v. Buttery, cited 5 Dowl. & R. 619, 3 Barn. & C. 700; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103; Ex parte Parker, 11 Neb. 313.

[481] Ante, § 364c.

It is also necessary that the *owner shall intend* to part with the *property* in the chattel. The statute does not apply where a person, by means of false and fraudulent representations, obtains the mere possession of another's property for a temporary purpose, though *he* may intend at the time to appropriate the property to his own use.[482] In such a case he is guilty of larceny.[483] The statutes do not apply, for instance, where a person merely hires or borrows property, using false pretenses to obtain possession, though he may intend to appropriate the same to his own use and deprive the owner permanently of his property therein.[484] The intention of the owner, therefore, as well as the intention of the accused, is to be considered. If the owner intends to part with the

[482] Reg. v. Kilham, L. R. 1 C. C. 261, 11 Cox, C. C. 561, Beale's Cas. 718; Reg. v. Prince, L. R. 1 C. C. 150; Smith v. People, 53 N. Y. 111, 13 Am. Rep. 474; Loomis v. People, 67 N. Y. 322, 23 Am. Rep. 123; Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178; Welsh v. People, 17 Ill. 339; Miller v. Com., 78 Ky. 15, 39 Am. Rep. 194; State v. Kube, 20 Wis. 217, 91 Am. Dec. 390. See, also, Rex v. Hammon, 2 Leach, C. C. 1083, Russ. & R. 221, 4 Taunt. 304.

[483] Ante, § 316c.

[484] See the cases above cited.

property, and not merely with the possession, the offense is the obtaining of property by false pretenses, and not larceny.[485]

In some states, by express statutory provision, a defendant indicted for false pretenses may be convicted notwithstanding the evidence may show that the offense was larceny.

368. Necessity for Injury.

(*a*) *In General.*—It is necessary, in order that a case may come within the statutes against obtaining property by false pretenses, that the person from whom it is obtained shall be defrauded. If he sustains no injury, the offense is not committed.[486] It is not

[485] Rex v. Adams, Russ. & R. 225, Beale's Cas. 720; Reg. v. Thompson, Leigh & C. 233, 9 Cox, C. C. 222; Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589; State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

[486] People v. Thomas, 3 Hill (N. Y.) 169, Beale's Cas. 722; State v. Asher, 50 Ark. 427; People v. Jordan, 66 Cal. 10, 56 Am. Rep. 73; State v. Palmer, 50 Kan. 318; State v. Clark, 46 Kan. 65.

In State v. Palmer, supra, it was said: "The mere obtaining of money under false pretenses does not alone constitute a crime. The money must be obtained to the injury of some one. Though money is obtained by misrepresentation, if no injury follows, no crime is accomplished.

obtaining property by false pretenses, within the meaning of the statutes, to induce another to pay a debt which is justly due from him, or to do any other act which he is legally bound to do, though he is induced to do so by false pretenses.[487] "A false representation by which a man may be cheated into his duty is not within the statute."[488]

A person is injured and defrauded, within the meaning of the law, if by false and fraudulent pretenses he is induced to take something different from what he bargained for. That it is of equal value is immaterial.[489]

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* * * A person must be charged with and convicted of some specific offense, if convicted at all. It will not do to convict on general principles, because the evidence shows the defendant devoid of common honesty."

[487] Rex v. Williams, 7 Car. & P. 354; People v. Thomas, 3 Hill (N. Y.) 169, Beale's Cas. 169; Com. v. McDuffy, 126 Mass. 467; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103.

[488] People v. Thomas, supra.

[489] In State v. Mills, 17 Me. 211, it was held that an indictment would lie against a person for obtaining money and property for a horse by falsely representing the horse to be a horse called "The Charley," though it appeared that the horse was equal in value to the horse called "The Charley." "The horse called 'The Charley,'" it was said,

(*b*) *Obtaining Charity.*—By the weight of authority the statute applies where a person obtains charity by false pretenses, as by a false begging letter. There is no want of injury because the property is given away.[490]

(*c*) *Wrong on the Part of the Person Defrauded.*—As was shown in a preceding chapter, on an indictment for obtaining property by false pretenses, it is no defense to show that the person defrauded was also in the wrong, as that he also made false pretenses with intent to defraud the accused.[491]

369. The Thing Obtained.

The statutes vary somewhat in the different jurisdictions as to the subjects of this offense. The statute of 30 Geo. II. punished the obtaining of "money, goods, wares, or merchandise." The later English statutes

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"might have had the reputation of possessing qualities which rendered it desirable for the party injured to become the owner of him."

[490] Reg. v. Jones, 1 Den. C. C. 551, 3 Car. & K. 346, 4 Cox, C. C. 198; Reg. v. Hensler, 11 Cox, C. C. 570, 22 Law Times (N. S.) 691; Com. v. Whitcomb, 107 Mass. 486, Beale's Cas. 751. And see State v. Matthews, 91 N. C. 635. Contra, People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

[491] Ante, § 157.

use the words "chattels, money, or valuable security." In this country many of the statutes are much broader, using such terms as "property," "personal property," "evidence of debt," "other things of value," etc.

The term "chattels" includes only such things as are the subject of larceny at common law.[492] The term "money" has been held, though not by all courts, not to include bank notes.[493] "Property" and "personal property" are much broader terms, and include, not only everything that is the subject of larceny at common law, but also promissory notes and bills or drafts.[494] Obtaining

[492] A dog, not being the subject of larceny at common law, was held not to be within the English statute. Reg. v. Robinson, Bell, C. C. 34, Beale's Cas. 721. See, also, State v. Burrows, 11 Ired. (N. C.) 477.

In Reg. v. Boulton, 1 Den. C. C. 508, 2 Car. & K. 917, 3 Cox, C. C. 576, a railway ticket was held to be a chattel, within the meaning of the English statute. But the soundness of this decision is doubtful. See ante, § 311.

[493] Rex v. Hill, Russ. & R. 190; Com. v. Swinney, 1 Va. Cas. 146, 5 Am. Dec. 512. Contra, State v. Kube, 20 Wis. 217, 91 Am. Dec. 390.

[494] State v. Switzer, 63 Vt. 604, 25 Am. St. Rep. 789; People v. Reed, 70 Cal. 529; State v. Patty, 97 Iowa, 373.

the discharge of a debt or a credit on a account or on a note is not obtaining money or property;[495] nor is the obtaining of judgment by consent, though the judgment is afterwards satisfied by the payment of money.[496]

Some of the states use the terms "valuable thing" or "thing of value." These terms, it has been said, include everything of a personal nature that is of value.[497] They include notes, checks, and other evidences of debt or choses in action,[498] provided they are valid in the hands of *bona fide* holders, but not

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[495] Rex v. Wavell, 1 Mood. C. C. 224; Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103; State v. Moore, 15 Iowa, 412. See Reg. v. Eagleton, Dears. C. C. 515, 6 Cox, C. C. 559.

[496] Com. v. Harkins, 128 Mass. 79, Beale's Cas. 752.

[497] See State v. Thatcher, 35 N. J. Law, 445, where it was held that the words "valuable thing" included the prosecutor's own note or contract of suretyship. It was said: "The legislature intended to denounce as a crime the obtaining by deceit of every valuable thing of a personal nature. 'Other valuable thing' includes everything of value."

[498] State v. Tomlin, 29 N. J. Law, 13; State v. Porter, 75 Mo. 171; Tarbox v. State, 38 Ohio St. 581.

otherwise, for unless they may be enforced or used they are of no value.[499] They do not include land.[500]

Obtaining board or lodging has been held not to be obtaining property within the meaning of the Wisconsin statute, [501] but it is in terms punished in some jurisdictions.[502]

There are also statutes in most jurisdictions punishing any person who, by false pretenses, and with intent to defraud, procures another's signature to a written instrument, or to particular kinds of instruments.[503]

[499] See Robinson v. State, 53 N. J. Law, 41; State v. Clay, 100 Mo. 571. Compare, however, State v. Porter, supra.

[500] The words "money, goods, property, or other things of value" do not include land. State v. Burrows, 11 Ired. (N. C.) 477.

[501] See State v. Black, 75 Wis. 490, Beale's Cas. 723. And see Reg. v. Gardner, 7 Cox, C. C. 136. But see State v. Snyder, 66 Ind. 203.

[502] See State v. Kingsley, 108 Mo. 135.

[503] See Fenton v. People, 4 Hill (N. Y.) 126; People v. Stone, 9 Wend. (N. Y.) 182; State v. Alexander, 119 Mo. 447; State v. Layman, 8 Blackf. (Ind.) 330.

Unless the instrument is one which takes effect without delivery, delivery, as well as signing, is necessary to complete the offense. See Com. v. Hutchison, 114 Mass. 325; Fenton v. People, 4 Hill (N. Y.) 126; State v. Clark, 72 Iowa, 30.

Property not in Existence.—The property need not be in existence at the time the pretense is made. Thus, if a person orders a thing to be manufactured for him,—as a wagon, for example,—and gets it made and delivered by falsely and fraudulently pretending to be the agent of a corporation, an indictment will lie.[504]

IV. ROBBERY.

370. Definition.—Robbery, which is one of the common-law felonies, is the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or by putting him in fear.[505]

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[504] Reg v. Martin, L. R. 1 C. C. 56, 10 Cox, C. C. 383.

[505] Rex v. Donnally, 1 Leach, C. C. 193; Williams v. Com. (Ky.) 50 S. W. 240; Com. v. Snelling, 4 Binn. (Pa.) 379; Houston v. Com., 87 Va. 257; Hammond v. State, 3 Cold. (Tenn.) 129; Clary v. State, 33 Ark. 561. And see State v. Lawler, 130 Mo. 366, 51 Am. St. Rep. 575.

"Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale, P. C. 532. See, also, 1 Hawk. P. C. c. 16, § 19, Beale's Cas. 419.

Robbery is a "felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East, P. C. 707.

The common-law offense of robbery is "the felo-

Robbery includes larceny, and all the elements that are necessary to constitute larceny are also necessary to constitute robbery. Therefore,

1. **The thing taken must be the subject of larceny.**
2. **There must be both a taking and a carrying away of the property,—a trespass and an asportation.**
3. **The taking and carrying away must be with felonious intent,—that is, with a fraudulent intent to deprive the owner permanently of his property.**

The aggravating circumstances necessary to constitute robbery, as distinguished from simple larceny, are these:

1. **The property must be taken from the person of another. But if it is taken in his presence, it is taken constructively from his person.**
2. **The taking must not only be without his consent, but it must also be accomplished either by violence or by putting him in fear.**

371. The Subject of Robbery.

To constitute robbery at common law, the thing taken must be the subject of larceny.[506]

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nious and forcible taking from the person of another of goods or money to any value, by violence or putting in fear." Houston v. Com., 87 Va. 257.

[506] **Rex** v. Phipoe, 2 Leach, C. C. 673, 2 East, P. C. 599; State v. Trexler, 2 Cap. Law Repos. (N. C.) 90, 6 Am. Dec. 558. As to what is the subject of larceny, see ante, § 304 et seq.

It must, therefore be something which the law recognizes as property, and it must be personal as distinguished from real property, and, at common law, something more than a mere chose in action.[507] It must also be of some value, though the slightest value to the person robbed is sufficient.[508] And it must be the property of another. A man is not guilty of robbery in taking his own property, though he may do so by violence or by putting in fear,[509] unless the person robbed has a special property therein and right to possession.[510] The property taken need not

[507] State v. Trexler, supra, §§ 305-311.

[508] Jackson v. State, 69 Ala. 249. See Rex v. Bingley, 5 Car. & P. 602, where it was held robbery to take a piece of paper on which a memorandum was written. And see Clary v. State, 33 Ark. 561.

Property that is of no value is not the subject of robbery, any more than of larceny. See Collins v. People, 39 Ill. 233.

Thus, a void bond or note, where choses in action are made the subject of larceny by statute, is not the subject of larceny (ante, § 312), nor of robbery. Phipoe's Case, supra.

[509] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; Barnes v. State, 9 Tex. App. 128; People v. Vice, 21 Cal. 344. And see Com. v. Clifford, 8 Cush. (Mass.) 215.

[510] See ante, § 313b.

be owned by the person robbed. Actual possession or custody is sufficient as against the wrongdoer.[511]

Anything that is the subject of larceny is also the subject of robbery. If something that is not the subject of larceny at common law, as a note or other evidence of a chose in action, is made the subject of larceny by statute, it becomes also the subject of robbery.[512]

372. The Taking and Carrying Away.

To constitute robbery, the property must, as in larceny, be both taken and carried away.[513] There must be an asportation as well

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[511] Durand v. People, 47 Mich. 332. And see People v. Shuler, 28 Cal. 490; Brooks v. People, 49 N. Y. 436, 10 Am. Rep. 398; State v. Gorham, 55 N. H. 152.

[512] See Collins v. People, 39 Ill. 233; Turner v. State, 1 Ohio St. 422; State v. Gorham, 55 N. H. 152.

[513] As in larceny, so in robbery, the property may be taken from the constructive possession of the owner, though the robber may have it in his own hand. In James v. State, 53 Ala. 380, the accused, while he was traveling in company with the owner of goods, was intrusted with them to help carry them along, and, while so intrusted with them, he carried them off by violence feloniously exerted against the person of the owner. It was

as a trespass.[514] If a man tells another, with threats, to give up or lay down his property, and the other drops or throws it to the ground, and the assailant is apprehended before he can pick it up, or goes away without picking it up, there is no robbery, because there is no asportation.[515] To constitute an asportation, the robber, like the thief in larceny, must acquire complete control of the property at least for an instant.[516] For this reason a man does not commit robbery in seizing another's watch, if he is unable to break the chain, and relinquishes his effort to take it.[517] The slightest asportation is sufficient. If the assailant acquires complete possession and

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held that this was robbery, as the owner had constructive possession up to the time of the felonious violence.

A person cannot be robbed of his property if it is in the possession of another. Rex v. Fallows, 5 Car. & P. 508. And see Reg. v. Rudick, 8 Car. & P. 237.

[514] 3 Inst. 69; 1 Hale, P. C. 533; Rex v. Farrell, 1 Leach, C. C. 322, note; Com. v. Clifford, 8 Cush. (Mass.) 215.

[515] 1 Hale, P. C. 533; Rex v. Farrell, 1 Leach, C. C. 322, note.

[516] Ante, §§ 321, 322.

[517] Ante, § 322.

control of the property, even for an instant, the offense is complete, though he immediately afterwards drops or abandons it, or returns it to the person robbed.[518]

373. Taking from the Person or in the Presence of Another.

It is said that, to constitute robbery, the property must be taken from the *person* of

[518] "If A. have his purse tied to his girdle, and B. assaults him to rob him, and, in struggling, the girdle breaks, and the purse falls to the ground, this is no robbery, because no taking. But if B. take up the purse, or if B. had the purse in his hand, and then the girdle break, and, striving, lets the purse fall to the ground, and never takes it up again, this is a taking and a robbery." 1 Hale, P. C. 533. And see Rex v. Lapier, 1 Leach, C. C. 320, 2 East, P. C. 557, 708; Rex v. Peat, 1 Leach, C. C. 228.

In Rex v. Lapier, supra, which is a leading case, it was held that there was a sufficient taking and asportation to constitute robbery, where the accused tore an earring from a lady's ear, but dropped it in her hair, since it was "in his possession for a moment," though almost instantly lost.

And in Rex v. Peat, supra, it was held that a person who took a purse of money from another by putting him in fear was guilty of robbery, though he restored it to him immediately, saying, "If you value your purse, take it back, and give me the contents," and was apprehended before the contents were delivered to him.

another, and in theory this is true.[519] But it is not to be understood from this that the taking must be from the person in the popular and strict sense. If property is taken in the *presence* of the owner, it is, in contemplation of law, taken from his person.[520] A man is guilty of robbery, therefore, and not

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[519] 1 Hale, P. C. 532; 1 Hawk. P. C. c. 34, p. 147; Rex v. Phipoe, 2 Leach, C. C. 673, 2 East, P. C. 599; Stegar v. State, 39 Ga. 583, 99 Am. Dec. 472; People v. Beck, 21 Cal. 385; Kit v. State, 11 Humph. (Tenn.) 167; State v. Leighton, 56 Iowa, 595.

An indictment for robbery, therefore, is fatally defective if it does not allege that the property was taken from the person of another. Stegar v. State, and other cases cited above.

In People v. Beck, supra, an indictment which alleged that the property was taken "from another person," instead of "from the person" of another, was held fatally defective as an indictment for robbery.

[520] 1 Hale, P. C. 532; Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699; Reg. v. Selway, 8 Cox, C. C. 235, Beale's Cas. 700; Crews v. State, 3 Coldw. (Tenn.) 350; State v. Calhoun, 72 Iowa, 432, 2 Am. St. Rep. 252; Clements v. State, 84 Ga. 660, 20 Am. St. Rep. 385; Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242; Turner v. State, 1 Ohio St. 422; Croker v. State, 47 Ala. 53; Houston v. Com., 87 Va. 257; U. S. v. Jones, 3 Wash. C. C. 209, 216, Fed. Cas. No. 15,494.

merely of larceny, if he comes into another's presence, and, after putting him in fear, drives away his cattle, or compels him to open his safe and takes money therefrom, or compels him to throw down his purse and picks it up.[521] It is not even necessary that the taking shall be in the immediate presence of the owner. It is enough if the property is so near that it can be said to be in his personal custody and care,—as where it is in another room of the house where he is,—and if the taking of it is accomplished by violence or by putting him in fear.[522]

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[521] "In robbery, it is sufficient if the property be taken in the presence of the owner. It need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him, or, having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse, which the other, in his fright, had thrown into a bush, or his hat, which had fallen from his head." 2 East, P. C. 707.

[522] Reg. v. Selway, 8 Cox, C. C. 235, Beale's Cas. 700; State v. Calhoun, 72 Iowa, 432, 2 Am. St. Rep. 252; Clements v. State, 84 Ga. 660, 20 Am. St. Rep. 385.

In Clements v. State, supra, it was held that where a person was in his smoke house, within fif-

374. Force or Violence.

In robbery the taking of the property must not only be without the consent of the owner, so as to amount to a trespass, but it must be accompanied by violence, actual or constructive. As we shall see in a subsequent section, putting in fear is constructive violence. When there is no putting in fear, there must be actual violence. Sufficient force must be used to overcome resistance, and the mere force that is required to take possession, when there is no resistance, is not enough.[523] For

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teen steps from his dwelling house, all the property in the dwelling house was in his immediate possession and control, and where he was prevented by threats and intimidation from leaving the smoke house, and returning to the dwelling house, until the dwelling house was entered, and property stolen therefrom, the offense was robbery.

In State v. Calhoun, supra, the accused went into the dwelling house of a lady, and, by violence and intimidation, extorted information as to where her valuables were, and then, leaving her tied in one room, went into another room, and took her watch and money. It was held that this was a taking in her presence, and constituted robbery.

[523] Rex v. Horner, 1 Leach, C. C. 291, note, 2 East, P. C. 703; Rex v. Gnosil, 1 Car. & P. 304; State v. John, 5 Jones (N. C.) 163, 69 Am. Dec. 777; Hall v. People, 171 Ill. 540; State v. Miller, 83 Iowa,

example, it is not robbery to obtain property from the person or in the presence of another by a mere trick, and without force, or to pick another's pocket without using more force than is necessary to lift the property from the pocket.[524] Nor is it robbery to suddenly snatch property from another, when there is no resistance, and no more force, therefore, than is necessary to the mere act of snatching;[525] or to strike property from another's hand, and then snatch it up and run off with it.[526]

If there is any injury to the person of the

291; Williams v. Com. (Ky.) 50 S. W. 240; Brennon v. State, 25 Ind. 403; Spencer v. State, 106 Ga. 692.

[524] State v. John, supra; Fanning v. State, 66 Ga. 167; Thomas v. State, 91 Ala. 34.

[525] Reg. v. Walls, 2 Car. & K. 214; Rex v. Macauley, 1 Leach, C. C. 287; Rex v. Baker, 1 Leach, C. C. 290, 2 East, P. C. 702; Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110; State v. Trexler, 2 Cap. Law Repos. (N. C.) 90, 6 Am. Dec. 558; People v. Hall, 6 Park. Cr. R. (N. Y.) 642; McCloskey v. People, 5 Park. Cr. R. (N. Y.) 299; Bonsall v. State, 35 Ind. 460. Contra, under the Iowa statute, State v. Carr, 43 Iowa, 518.

[526] Rex v. Francis, 2 Strange, 1015, 2 East, P. C. 708, Beale's Cas. 699; People v. McGinty, 24 Hun (N. Y.) 62.

owner, or if he resists the attempt to rob him, and his resistance is overcome, there is sufficient violence to make the taking robbery, however slight the resistance. Robbery is committed if there is any struggle to retain possession, or if there is any injury or actual violence to the person of the owner in the taking of the property.[527] It has been held robbery for a person to seize another's watch or purse, and use sufficient force to break a chain or guard by which it is attached to his person,[528] or to run against another, or rudely push him about, for the purpose of diverting

[527] Rex v. Davies, 1 Leach, C. C. 290, note, 2 East, P. C. 709; Shinn v. State, 64 Ind. 13, 31 Am. Rep. 110; Com. v. Snelling, 4 Binn. (Pa.) 379; Jackson v. State, 69 Ala. 249; State v. Trexler, 2 Cap. Law Repos. (N. C.) 90, 6 Am. Dec. 558; State v. Gorham, 55 N. H. 152; Spencer v. State, 106 Ga. 692.

To snatch an earring from a woman's ear by tearing her ear has been held sufficient violence to make the offense robbery. Rex v. Lapier, 1 Leach, C. C. 320, 2 East, P. C. 557, 708.

So, where a diamond pin was snatched from a lady's headdress with such force as to remove it with part of her hair. Rex v. Moore, 1 Leach, C. C. 335.

[528] Rex v. Mason, Russ. & R. 419; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; State v. Broderick, 59 Mo. 318.

his attention and robbing him, and thus take a purse from his pocket.[529] The fact, therefore, that surprise aids the force employed to accomplish the taking will not prevent the force from aggravating the offense, so as to make it robbery.[530] And it makes no difference that the victim does not know that he is being robbed.[531]

The taking itself must be by violence, and it follows, therefore, that the violence must precede or accompany the act of taking. Violence after the taking—as where a man picks another's pocket or snatches property, and, when detected or seized, uses violence to retain possession or to escape—cannot make the offense robbery.[532]

375. Putting in Fear.

(*a*) *In General.*—If property is taken by putting the owner in fear, and thereby preventing resistance, there is constructive violence, provided the fear is reasonable, and,

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[529] See Seymour v. State, 15 Ind. 288; Com. v. Snelling, 4 Binn. (Pa.) 379.

[530] State v. McCune, 5 R. I. 60, 70 Am. Dec. 176.

[531] Com. v. Snelling, 4 Binn. (Pa.) 379.

[532] State v. John, 5 Jones (N. C.) 163, 69 Am. Dec. 777, and other cases cited in the notes preceding.

if the other elements of the offense exist, it is as much robbery as if actual violence were used.[533] The putting in fear, however, must precede or accompany the act of taking, just as the force must do so when there is actual violence. If property is taken without violence or putting in fear, as by snatching, the fact that the owner is put in fear to prevent him from retaking it, or to escape, does not make the offense robbery.[534] The property need not necessarily be taken as soon as the owner is put in fear. If the fear continues, a subsequent taking will be robbery, though a considerable time may have elapsed.[535]

(*b*) *Sufficiency of Threat or Menace.*—It is not every threat or menace that will be sufficient to make a case of robbery, as distinguished from larceny. It must be of such a nature as to excite reasonable apprehension of danger, and to reasonably cause a man to

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[533] 2 East, P. C. 707; Hughe's Case, 1 Lewin, C. C. 301; Simon's Case, 2 East, P. C. 731; Rex v. Donnally, 1 Leach, C. C. 193; Houston v. Com., 87 Va. 257; Long v. State, 12 Ga. 293, 320; and cases hereafter cited.

[534] Rex v. Harman, 2 East, P. C. 736; Thomas v. State, 91 Ala. 34; Bonsall v. State, 35 Ind. 460.

[535] Long v. State, 12 Ga. 293, 322.

surrender his property.[536] The fear inspired in order to compel a man to surrender his property may be of injury either (1) to the person, or (2) to property, or (3) to character or reputation.

1. All of the authorities agree that fear of death or great bodily harm, if reasonably entertained, is sufficient to make a taking of property delivered by reason thereof robbery.[537]

2. It is also agreed that fear of injury to property may be sufficient,—as in the case of a threat to burn or tear down a house.[538]

3. As a general rule, subject to one exception, fear of injury to character or reputation is not sufficient. If a man threatens

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[536] See McCloskey v. People, 5 Park. Cr. R. (N. Y.) 299. In Long v. State, 12 Ga. 293, 321, it was said: "The rule is this: If the fact be attended with such circumstances of terror—such threatening, by word or gesture—as, in common experience, are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person, it is a case of robbery."

[537] Rex v. Simons, 2 East, P. C. 712, fear of rape. See Rex v. Blackham, 2 East, P. C. 711.

[538] Rex v. Astley, 2 East, P. C. 729; Rex v. Simons, 2 East, P. C. 731; Rex v. Brown, 2 East, P. C. 731.

to accuse another of an unnatural crime,—sodomy,—and thereby obtains property from him, the law regards it as robbery, because this offense is so loathsome that the fear of loss of character from such a charge, however unfounded it may be, is sufficient to reasonably induce a man to give up his property.[539] It is equally robbery, in such a case, whether the party be innocent or guilty.[540] This is the only exception to the rule that fear of loss of character is not sufficient to make out a case of robbery. To obtain property by threatening to accuse another of other crimes is punished by statute in some jurisdictions, but it is not robbery at common law, if no violence is used.[541] Thus, it has been held that it is not robbery at common law to obtain money from a man by threatening to accuse him of forgery or of passing

[539] Rex v. Donally, 1 Leach, C. C. 193, 2 East, P. C. 713; Rex v. Jones, 1 Leach, C. C. 139; Rex v. Hickman, 1 Leach, C. C. 278, 2 East, P. C. 728; Rex v. Gardner, 1 Car. & P. 479; Long v. State, 12 Ga. 293, 319.

[540] Rex v. Gardner, supra. And see Reg. v. Cracknell, 10 Cox, C. C. 408; Reg. v. Richards, 11 Cox, C. C. 43.

[541] Rex v. Knewland, 2 Leach, C. C. 731, 2 East,

counterfeit money,[542] or to obtain money from a woman by threatening to accuse her husband of indecent assault.[543] It is otherwise, of course, if such threats are accompanied by violence.[544]

In no case is the mere threat of injury, whether to the person, or to property, or to character, sufficient to raise the offense to robbery, unless it in fact inspires fear of the injury, and is the cause of the property being surrendered.[545]

(*c*) *Fear not Necessary if There is Actual Violence.*—Some writers have defined rob-

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P. C. 732; Britt v. State, 7 Humph. (Tenn.) 45; Long v. State, 12 Ga. 293, 318.

[542] Britt v. State, supra.

[543] Rex v. Edwards, 5 Car. & P. 518.

[544] Bussey v. State, 71 Ga. 100, 51 Am. Rep. 256; Long v. State, 12 Ga. 293, 318. Handcuffing a person after falsely arresting him would be sufficient violence. Rex v. Gascoigne, 1 Leach, C. C. 280, 2 East, P. C. 709.

[545] Rex v. Fuller, Russ. & R. 408; Rex v. Reane, 2 Leach, C. C. 616, 2 East, P. C. 734; Rippetoe v. People, 172 Ill. 173.

Thus, if property is parted with on a threat to accuse one of an unnatural crime, but for the purpose of prosecuting, and not from fear of loss of character, the taking of the property is not robbery. Rex v. Fuller, supra; Rex v. Reane, supra.

bery as a taking by violence from the person of another, putting him in fear, or as a taking by violence from the person of one put in fear,[546] thus requiring both violence *and* putting in fear, and not violence *or* putting in fear. This, however, is wrong. If there is actual violence, it is immaterial whether the victim is put in fear or not.[547] The victim of a robbery by actual violence need not know that his property is being taken.[548] Thus, if a man is knocked down and robbed while he is insensible, it is robbery.[549] So, as was stated in a previous section,[550] it is robbery to run against a man, or rudely push him

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[546] 3 Inst. 68; 1 Hale, P. C. 532; 1 Hawk. P. C. c. 34, p. 147; 2 Bish. New Crim. Law, § 1156. For the definitions of Hale and Hawkins, see ante, § 370, note 505.

[547] Fost. C. L. 128; Com. v. Humphries, 7 Mass. 242; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; Com. v. Snelling, 4 Binn. (Pa.) 379; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 418. And see State v. Burke, 73 N. C. 83; Clary v. State, 33 Ark. 561; State v. Gorham, 55 N. H. 152; Houston v. Com., 87 Va. 257.

[548] Com. v. Snelling, 4 Binn. (Pa.) 379.

[549] See Rex v. Hawkins, 3 Car. & P. 392; State v. Burke, 73 N. C. 83; Clary v. State, 33 Ark. 561, 564.

[550] Ante, § 374, and cases there cited.

about, for the purpose of diverting his attention and robbing him, and then take a purse from his pocket;[551] or to seize a man's watch suddenly, and take it by breaking the chain,[552] or to take an earring from a lady's ear by tearing the ear, etc.[553] The fact that surprise aids the force is immaterial.[554]

376. Consent of the Owner.

The property must be taken without the consent of the owner. This is necessary, not only because robbery includes larceny, and larceny cannot be committed when the owner consents to part with the property, but also because robbery, as has been shown, can only be committed by violence or by putting in fear. If a person, therefore, freely consents to the taking of his property, though he may consent solely for the purpose of prosecuting the taker, and the latter may not know of his consent, there is no robbery.[555]

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[551] Com. v. Snelling, 4 Binn. (Pa.) 379; Seymour v. State, 15 Ind. 288.

[552] Rex v. Mason, Russ. & R. 419; State v. McCune, 5 R. I. 60, 70 Am. Dec. 176; State v. Broderick, 59 Mo. 318.

[553] Rex v. Lapier, 1 Leach, C. C. 320, 2 East, P. C. 557, 708; Rex v. Moore, 1 Leach, C. C. 335.

[554] State v. McCune, supra.

[555] McDaniel's Case, Fost. C. L. 121, Beale's Cas.

377. Taking Need not be "Against the Will" of the Owner.

It has sometimes been said that the taking must be "against the will" of the owner, in order to constitute robbery.[556] But this is not true. It is enough if the taking be without his consent, provided there is violence. If a man is rendered unconscious by a blow, he has no will, and yet it is clearly robbery to knock a man down for the purpose of robbing him, and then take property from him while he is insensible.[557] So, as we have seen, it is robbery to take property by surprise, if there is actual violence.[558]

378. The Felonious Intent.

The felonious intent to steal, or *animus furandi,* is just as necessary to constitute robbery as it is to constitute larceny. The robber must have a fraudulent intent, and

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152; Rex v. Fuller, Russ. & R. 408. And see Connor v. People, 18 Colo. 373.

[556] 2 East, P. C. 707; Rex v. McDaniel, Fost. C. L. 121, Beale's Cas. 152; U. S. v. Jones, 3 Wash C. C. 209, Fed. Cas. No. 15,494.

[557] 1 Whart. Crim. Law, §§ 850, 855; Fost. C. L. 128; Rex v. Hawkins, 3 Car. & P. 392. And see State v. Burke, 73 N. C. 83; Clary v. State, 33 Ark. 561, 564.

[558] Ante, § 374.

must intend to deprive the owner permanently of his property.[559] To take property, therefore, under a *bona fide* claim of right, however unfounded,—as under a claim of ownership, or in a *bona fide* attempt to enforce payment of a debt,—is not robbery, though the taking may be accompanied by violence or putting in fear.[560] Nor is it robbery to take property by violence or putting in fear, if the intent is merely to use it temporarily, and then return it.[561]

The felonious intent to steal must exist at

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[559] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; Reg. v. Hemmings, 4 Fost. & F. 50; Jordan v. Com. 25 Grat. (Va.) 943; State v. Hollyway, 41 Iowa, 200, 202, 20 Am. Rep. 586; State v. Sowls, Phil. (N. C.) 151; Com. v. White, 133 Pa. St. 182, 19 Am. St. Rep. 628; Hammond v. State, 3 Cold. (Tenn.) 129.

In the case of an assault, the original intent need not have been to rob. Thus, where a man assaulted a woman with intent to rape her, and, during the attempt to rape, took money which she offered him, it was held that he was guilty of robbery. Rex v. Blackham, 2 East, P. C. 711.

[560] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; Brown v. State, 28 Ark. 126; People v. Hall, 6 Park. Cr. R. (N. Y.) 642; Long v. State, 12 Ga. 293, 320; Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242; State v. Deal, 64 N. C. 270.

[561] Ante, § 328.

the time the property is taken. If property is taken without any felonious intent, such an intent formed and carried out afterwards does not relate back so as to make the taking robbery.[562]

As in the case of larceny, some of the courts have held that the taking in robbery must be *lucri causa,* or for the sake of gain,[563] while others have held that this is not necessary.[564]

379. Robbery under the Statutes.

(*a*) *In General.*—In most of the states statutes have been enacted, defining and punishing robbery. Some of them are merely declaratory of the common law, while others define it differently.[565] These statutes are to be construed in the light of the common law, and the terms used in them are to be taken in the sense in which they were understood at common law, unless such a construction is contrary to the express terms of the statute. Thus, if a statute defines robbery as a taking "from the person" of another, it is to be con-

[562] Jordan v. Com., 25 Grat. (Va.) 943.

[563] Ante, § 330.

[564] Jordan v. Com., 25 Grat. (Va.) 943.

[565] See Houston v. Com., 87 Va. 257; Crews v. State, 3 Cold. (Tenn.) 350.

strued as including a taking in the presence of another.[566] And if a statute requires violence or putting in fear, it is to be construed as requiring such violence and such putting in fear as was necessary at common law, unless the terms of the statute show a contrary intention.[567] And unless expressly so provided, a statute is not to be construed as dispensing with the necessity that the property shall be that of another, and that it shall be carried away.[568]

Degrees of Robbery.— In some jurisdictions robbery is divided into degrees according to the circumstances under which it is committed.[569]

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[566] State v. Calhoun, 72 Iowa, 432, 2 Am. St. Rep. 252; Houston v. Com., 87 Va. 257. And see ante, § 47e.

[567] Com. v. Humphries, 7 Mass. 242; Houston v. Com., 87 Va. 257; Crews v. State, 3 Cold. (Tenn.) 350.

The Texas statute differs from the common law. See Williams v. State, 12 Tex. App. 240.

Where statutes have used the word "intimidation," it has been construed as equivalent to the words "putting in fear," and as meaning the same thing as those words in the common-law definition of robbery. Long v. State, 12 Ga. 293, 320; Clary v. State, 33 Ark. 561, 564.

[568] Com. v. Clifford, 8 Cush. (Mass.) 215.

[569] See Pen. Code Minn. § 197.

(*b*) *Robbery in Particular Places.*—In many jurisdictions there are statutes prescribing a special punishment for robbery committed in particular places, as in a dwelling house;[570] in or near a highway,[571] etc. Under these statutes the same elements, such as a felonious intent, violence or putting in fear, etc., are necessary, as in other robberies[572]

V. RECEIVING AND CONCEALING PROPERTY STOLEN, EMBEZZLED, ETC.

380. Receiving Stolen Property —(a) In General. —It was a misdemeanor at common law to receive stolen goods, knowing them to have been stolen. The offense is now very generally defined by statute substantially as at common law, except that in most jurisdictions it is made a felony. To constitute this offense—

1. **The property must be received.**
2. **It must at the time be stolen property.**
3. **The receiver must know that it is stolen property.**
4. **His intent in receiving it must be fraudulent.**[573]

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[570] Ward v. Com., 14 Bush (Ky.) 233.

[571] Rex v. Francis, 2 Strange, 1015, Beale's Cas. 699.

[572] Ward v. Com., 14 Bush (Ky.) 233.

[573] The Virginia statute provides that, if any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deem-

(*b*) *At Common Law,* the receiver of stolen goods was indictable for *misprision* of the felony of larceny, because of his knowing the thief and neglecting to prosecute him, or of *compounding* the felony, if he agreed not to prosecute him, both of which offenses were substantive misdemeanors.[574] He was not indictable as an accessary after the fact, for he receives the goods, and not the thief,[575] and, to render one an accessary after the

ed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted. Code 1887, § 3714. And there are similar statutes in many other states. In Hey v. Com., 32 Grat. (Va.) 946, 951, it was said by Judge Burks: "To convict an offender against this statute, four things must be proved: (1) That the goods or other things were previously stolen by some other person; (2) that the accused bought or received them from another person, or aided in concealing them; (3) that, at the time he so bought or received them, or aided in concealing them, he knew they had been stolen; (4) that he so bought or received them, or aided in concealing them, malo animo, or with a dishonest intent."

[574] 2 East, P. C. 743, 744; 1 Bish. New Crim. Law, § 699; 2 Bish. New Crim. Law, 1137. As to the offenses of misprison and compounding, see post, §§ 438, 439.

[575] 4 Bl. Comm. 38; 1 Hale, P. C. 619, 620; 1 Bish. New Crim. Law, § 699; Loyd v. State, 42 Ga. 221; People v. Stakem, 40 Cal. 599.

fact, the aid must be rendered to the thief personally.[576]

(*c*) *Statutes.*—In England, by the statute of 3 William & Mary, c. 9, § 4, and by later statutes, a receiver was made punishable as an accessary after the fact; but by the statute of 7 & 8 Geo. IV. c. 29, § 54, and by later statutes, he may be indicted either as an accessary after the fact, or for a substantive felony, if the property was obtained by a felony, or for a substantive misdemeanor, if the property was obtained by a misdemeanor.[577] In this country, statutes have been enacted in most states punishing the receiving of stolen property, knowing it to have been stolen, as a distinct substantive offense,—generally as a felony.[578]

381. The Receiving.

(*a*) *In General.*—To render one guilty of receiving stolen property, it is, of course, essential that he shall receive it. A person cannot be convicted if the property was never actually or potentially in his possession. He

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[576] Ante, § 184; Loyd v. State, supra.

[577] 24 & 25 Vict. c. 96, § 91.

[578] Com. v. Barry, 116 Mass. 1; Anderson v. State, 38 Fla. 3.

must at least have had the property under his control.[579] Manual possession, however, or touch, is not necessary. It is sufficient if there is control over the property.[580] A person is guilty of receiving, if possession is taken by his servant or agent by his direction.[581]

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[579] Reg. v. Hill, 2 Car. & K. 978; Reg. v. Wiley, 2 Den. C. C. 37, 4 Cox, C. C. 414, 1 Eng. Law & Eq. 567. In the case first cited, A. stole some fowls, and sent them by coach to another place in a box not addressed to any one, but stated, when he sent them, that a person would call for them when they should reach their destination. B. inquired for the box, and, when it was shown to her, claimed it, but it was not delivered to her. It was held that she could not be convicted as a receiver.

[580] Reg. v. Wiley, supra; Reg. v. Smith, Dears. C. C. 494, 6 Cox, C. C. 554, 33 Eng. Law & Eq. 531, Beale's Cas. 760; Reg. v. Miller, 6 Cox, C. C. 353, Beale's Cas. 759; State v. Stroud, 95 N. C. 626.

[581] In Reg. v. Miller, 6 Cox, C. C. 353, Beale's Cas. 759, stolen property was brought by the thief into A.'s shop, and A., with guilty knowledge, called a servant, and directed her to take the goods to a pawn shop, and pawn them for the thief. The servant did so, and brought back the money, and handed it to the thief in A.'s presence. It was held that this was a receiving of the property by A., though she never had manual possession of either the goods or the money. And see post, § 381(d), notes 589-592.

(*b*) *Receiving from a Receiver.*—It has been said without qualification that, to render one guilty of receiving stolen goods, he must receive them from the thief, or from an innocent agent of the thief, and not from a guilty receiver; and the reason given is that in his hands, and as to him, the goods are not stolen goods.[582] But this is not true under all of the statutes. The common-law offense is not committed by one who receives stolen goods from a guilty receiver, and who does not know the thief, for in such a case there is no misprision of felony nor compounding of felony.[583] So, where a receiver is punishable as an accessary after the fact of the thief, as under the earlier English statutes, and similar statutes in this country, the goods must be received from the thief.[584] But where the act of receiving is made a substantive offense, whether a felony or a misdemeanor, as by the present English statute, and by most of the statutes in this country,

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[582] 2 Bish. New Crim. Law, § 1140 (5); Foster v. State, 106 Ind. 272.

[583] Ante, § 380b.

[584] State v. Ives, 13 Ired. (N. C.) 338, Beale's Cas. 775.

without reference to the person who stole the property, the gist of the offense is the receiving and having property that has been stolen, knowing that it has been stolen, and there is no good reason why the offense should not be considered as committed by any one who receives such property with the necessary guilty knowledge, whether he receives it directly from the thief, or from the guilty receiver. There are decisions which fully sustain this view.[585] A person is cer-

[585] This view is supported by the dictum in State v. Ives, supra, and by the decisions in Anderson v. State, 38 Fla. 3, and Ream v. State, 52 Neb. 727. See, also, State v. Hazard, 2 R. I. 474, 60 Am. Dec. 96; State v. Feuerhaken, 96 Iowa, 299; Shriedley v. State, 23 Ohio St. 130, 139; Faunce v. People, 51 Ill. 311; Sanderson v. Com. (Ky.) 12 S. W. 136; Reg. v. Reardon, L. R. 1 C. C. 31, 10 Cox, C. C. 241.

In Anderson v. State, supra, the statute provided that whoever should buy, receive, or aid in the concealment of stolen property, knowing the same to have been stolen, should be punished, and it was held that an indictment under the statute need not name the thief, nor the person from whom the goods were received. "The buying and receiving of stolen goods," said the court, "knowing the same to have been stolen, is thereby made a substantive offense. The offense denounced by the statute is not buying, receiving, etc., stolen property from the thief himself, or from any other par-

tainly guilty of this offense if he receives stolen property from an innocent agent of the thief with the necessary guilty knowledge and intent.[586]

(c) *Husband and Wife.*—A husband may be convicted of receiving property which his wife has stolen voluntarily and without any constraint on his part, if he receives it with knowledge that she has stolen it.[587] But it seems that a wife cannot be guilty of receiving from her husband.[588]

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ticular person, but buying or receiving, etc., such property, knowing it to be stolen, from any person whatsoever."

There is a decision against this view in Foster v. State, 106 Ind. 272, in which the court cited Bishop and Wharton and two earlier Indiana cases—Kaufman v. State, 49 Ind. 248, and Owen v. State, 52 Ind. 379. Neither of these cases, however, are in point, and while the decision is supported by Bishop and Wharton, neither of these writers are sustained by the authorities cited by them. There is no reason for saying that property ceases to be "stolen property," i. e., property that has been stolen, as soon as it is delivered to a person who knows it has been stolen.

[586] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[587] Reg. v. M'Athey, Leigh & C. 250, 9 Cox, C. C. 251.

[588] 2 Bish. New Crim. Law, § 1142 (2); Reg. v.

(*d*) *Principal and Agent—Partners.*—A principal is indictable for receiving stolen property, if it is received by his agent by his direction or authority.[589] And if stolen property is received by a person as agent for another without authority, the latter becomes liable if he ratifies the receipt with guilty knowledge, and assumes control of the property.[590] Thus, if a wife assumes to act as agent of her husband in receiving stolen property, and he afterwards ratifies her act with full knowledge of the facts, and assumes

Brooks, Dears. C. C. 184, 14 Eng. Law & Eq. 580; Reg. v. Wardroper, Bell, C. C. 249, 8 Cox, C. C. 284.

[589] State v. Stroud, 95 N. C. 626. In this case it was said: "To constitute the criminal offense of receiving, it is not necessary that the goods should be traced to the actual personal possession of the person charged with receiving. It would certainly make him a receiver, in contemplation of law, if the stolen property was received by his servant or agent, acting under his directions, he knowing at the time of giving the orders that it was stolen, for 'qui facit per alium facit per se.' It is the same as if he had done it himself." See, also, Reg. v. Miller, 6 Cox C. C. 353, Beale's Cas. 759; Reg. v. Smith, 6 Cox C. C. 554, Dears. C. C. 494; State v. Habib, 18 R. I. 558.

[590] Reg. v. Woodward, Leigh & C. 122, 9 Cox, C. C. 95, 8 Jur. (N. S.) 104, Beale's Cas. 763; Sanderson v. Com. (Ky.) 12 S. W. 136.

control of the property, he is guilty of receiving.[501] In like manner, a partner is indictable if, with guilty knowledge, he ratifies the receipt of stolen property by his copartner on behalf of the firm, and assumes control separately or jointly with his partner.[502]

(*e*) *Distinguished from Larceny from Thief.*—The offense of receiving stolen goods is not committed by one who takes goods from a thief by trespass without his consent,

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[501] In Reg. v. Woodward, supra, stolen goods were delivered by the thief to a wife in the absence of her husband, and she paid something on account, but the price was not fixed. The husband and the thief afterwards met, and the husband, with the knowledge that the goods had been stolen, agreed upon the price, and paid the balance. It was held that he was guilty of receiving the goods, knowing them to have been stolen.

[502] Sanderson v. Com. (Ky.) 12 S. W. 136. And see Faunce v. People, 51 Ill. 311.

"While one partner cannot commit a crime for which his copartner, who is innocent, can be held criminally responsible, we cannot well see why one partner may not be guilty of receiving stolen goods, where his copartner has first received them with a guilty knowledge, and they are controlled and used by both with the guilty design and purpose on the part of both to deprive the owner of his property." Sanderson v. Com., supra.

and carries them away, *animo furandi.* This, as we have seen, is larceny.[593]

382. Character of the Property as Stolen Property.

To convict a person of receiving stolen property, it is necessary to show that, in fact and in law, the property was *stolen.*[594] It

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[593] 2 Bish. New Crim. Law, § 1140 (6). See Reg. v. Wade, 1 Car. & K. 739, Beale's Cas. 758.

[594] Com. v. King, 9 Cush. (Mass.) 284; Anderson v. State, 38 Fla. 3; Wilson v. State, 12 Tex. App. 481; O'Connell v. State, 55 Ga. 296.

A wife, even though she may have committed adultery, cannot steal her husband's goods (ante, § 313d, and therefore her paramour, receiving from her goods which she has taken from her husband, cannot be guilty of receiving stolen goods. Reg. v. Kenny, 2 Q. B. Div. 307, 13 Cox, C. C. 397.

An indictment for receiving stolen goods cannot be maintained if the evidence shows that the person from whom the defendant is alleged to have received them obtained them under circumstances making him guilty of embezzlement, or of obtaining goods by false pretenses, as distinguished from larceny. In Com. v. King, 9 Cush. (Mass.) 284, which was an indictment for receiving stolen bank bills, it appeared that the person from whom the defendant was alleged to have received the bills had obtained them from a bank for his master, on a check drawn by the latter, and that they had not reached the possession of the master before their appropriation. It was

is also necessary that the property shall have been *stolen property* at the time it was received by the accused. It is not enough to show that he thought it was stolen property. The offense, therefore, is not committed if the property, before its receipt, has come back into the possession of the owner or his agent.[595] The fact that the character of

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held that, as the servant's appropriation of the bills was embezzlement, and not larceny, the indictment could not be maintained.

The question as to the locality in which the property was stolen is elsewhere considered. See post, § 503.

[595] In U. S. v. De Bare, 6 Biss. 358, Fed. Cas. No. 14,935, the accused was indicted and convicted of receiving stolen postage stamps. The proof was that the thief deposited them in an express office, directed to the accused, and, after his arrest, gave a written order for them to a postmaster, who took them, and who afterwards, by order of the postoffice department, redeposited them in the express office, so that they were forwarded to the accused, and received by him. It was held that the conviction was wrong, as the stamps were no longer stolen property after they reached the hands of the postmaster, who was the agent of the government. See to the same effect, Reg. v. Schmidt, L. R. 1 C. C. 15, 10 Cox, C. C. 172, Beale's Cas. 769; Reg. v. Dolan, 6 Cox, C. C. 449, Dears C. C. 436, 29 Eng. Law & Eq. 533,

stolen property is changed before it reaches the receiver is immaterial, if he knows that it is stolen property. It is no defense, therefore, on a prosecution for receiving stolen bonds, to show that they were fraudulently altered by the thief before they were received by the accused.[596]

383. Knowledge That the Property was Stolen.

At common law, and by the express terms of the various statutes, it is necessary that the receiver shall know that the property has been stolen;[597] and he must know this at the time he receives it.[598]

It has been said that if a person receives

Beale's Cas. 765 (overruling Reg. v. Lyons, Car. & M. 217, 41 E. C. L. 122); Reg. v. Villensky, [1892] 2 Q. B. 597 (following Reg. v. Schmidt, supra, and Reg. v. Dolan, supra); Reg. v. Hancock, 38 L. T. (N. S.) 787, 14 Cox, C. C. 119.

[596] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116. So, where a sheep is stolen and killed, and a person receives part of the mutton. Rex v. Cowell, 2 East, P. C. 617.

[597] Reg. v. Adams, 1 Fost. & F. 86, Beale's Cas. 777; Huggins v. People, 135 Ill. 243, 25 Am. St. Rep. 357; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505; Durant v. People, 13 Mich. 351; May v. People, 60 Ill. 119; Aldrich v. People, 101 Ill. 16; State v. Houston, 29 S. C. 108; State v. Caveness, 78 N. C. 484; Copperman v.

stolen property with full knowledge of all the circumstances under which it was taken, and those circumstances show, as a matter of law, that it was obtained by larceny, it is not necessary to show that he knew that the circumstances made the taking larceny. He is chargeable with knowledge of the law from his knowledge of the facts. This, however, is doubtful.[599] If a person receives property, believing it to have been stolen, he is

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People, 56 N. Y. 591; Williamson v. Com. (Va.) 23 S. E. 762; Hey v. Com., 32 Grat. (Va.) 946.

The mere naked possession of stolen goods, without further evidence, is not sufficient to sustain a conviction, for it does not show guilty knowledge. Castleberry v. State, 35 Tex. Cr. R. 382, 60 Am. St. Rep. 53. Compare, however, People v. Welden, 111 N. Y. 569.

[598] "To be guilty, he must have known at the moment of receiving it that it has been stolen, and he must at that time have also received it with a felonious intent." State v. Caveness, 78 N. C. 484, 491.

[599] Com. v. Leonard, 140 Mass. 473, 54 Am. Rep. 485, Beale's Cas. 778. In this case the decision was this: The Massachusetts statute created two distinct offenses,—receiving stolen goods, knowing them to have been stolen, and receiving embezzled property, knowing it to have been embezzled. The accused was charged with the first offense, and it was held that, if he knew all the

guilty, though he does not know the facts and circumstances of the taking.[600] And if it appears from the evidence that the accused received the property under such circumstances that any reasonable man of ordinary observation would have known that it was stolen, the jury are authorized to find that he knew it was stolen.[601] The question, how-

facts under which the property was taken, and the facts showed larceny, as distinguished from embezzlement, it was no defense that he thought the facts constituted embezzlement. Compare, however, Reg. v. Adams, 1 Fost. & F. 86, Beale's Cas. 777.

[600] Com. v. Leonard, supra. And see Reg. v. White, 1 Fost. & F. 665, Beale's Cas. 778.

[601] Collins v. State, 33 Ala. 434, 73 Am. Dec. 426; Murio v. State, 31 Tex. Cr. R. 210; Com. v. Finn, 108 Mass. 466; Frank v. State, 67 Miss. 125; Huggins v. People, 135 Ill. 243, 25 Am. St. Rep. 357.

In State v. Feuerhaken, 96 Iowa, 299, it was held that it was not error to instruct the jury that, if all the facts and circumstances surrounding the receiving of the goods by the defendant were such as would reasonably satisfy a man of the defendant's age and intelligence that the goods were stolen, or if he failed to follow up the inquiry so suggested, for fear he would learn the truth, and know that the goods were stolen, then the defendant should be as rigidly held responsible as if he had actual knowledge."

ever, is one of fact, and the jury are not bound to infer knowledge from such circumstances.[602]

384. Fraudulent Intent.

To constitute this offense, it is necessary that the property shall be received with a fraudulent intent.[603] Thus, the offense is not committed by one who receives stolen property, though he knows it to have been stolen, if his intent is to secure it for the true owner, and return it without a reward, and not to defraud him.[604] The necessity for a

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[602] Collins v. State, supra.

[603] People v. Johnson, 1 Park. Cr. R. (N. Y.) 564; State v. Hodges, 55 Md. 127; U. S. v. Lowenstein, 21 D. C. 515; Aldrich v. People, 101 Ill. 16; Rice v. State, 3 Heisk. (Tenn.) 215, 226; Arcia v. State, 26 Tex. App. 193.

If it is shown that stolen goods were received with knowledge that they were stolen, a fraudulent intent may be inferred. U. S. v. Lowenstein, supra.

[604] "To constitute the offense of receiving stolen property, knowing the same to have been stolen, the act of receiving or concealing must be accompanied by a criminal intent,—an intent to aid the thief, or to obtain a reward for restoring the property to the owner, or an intent to in some way derive profit from the act. There must be a guilty knowledge, a fraudulent intent,

fraudulent intent is to be implied even when a statute punishes any one who shall receive stolen property, knowing it to have been stolen, and is silent as to the intent.[605]

It is not necessary that the receiving shall be *lucri causa,* or, in other words, that the receiver shall act from motives of personal gain. If his object is to aid the thief, it is sufficient, for there is the necessary fraudulent intent.[606]

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concurrent with the act. If the property was received or concealed with the purpose and intent of restoring it to the owner without reward, or with any other innocent intent, the mere knowledge that it was stolen property would not make the act criminal." Arcia v. State, 26 Tex. App. 193, 205.

Receiving stolen goods with the intent, by concealing the same, to induce the owner to pay a reward for their return to him, is a receipt with intent to defraud the owner. It was so held in State v. Pardee, 37 Ohio St. 63, under a statute making such an intent an element of the offense, and of course such an intent is sufficient at common law. People v. Wiley, 3 Hill (N. Y.) 194.

[605] People v. Johnson, 1 Park. Cr. R. (N. Y.) 564, and other cases cited in note 603, supra; State v. Smith, 88 Iowa, 1, is to the contrary, but it cannot be sustained.

[606] Rex v. Richardson, 6 Car. & P. 335, Beale's Cas. 758; State v. Hodges, 55 Md. 127; Rex v.

385. License from the Owner.

On a prosecution for receiving stolen goods, knowing them to have been stolen, the fact that the accused was authorized by the owner of the goods to receive them for him is no defense, if he received them with a fraudulent intent to deprive the owner of them.[607]

386. Receiving Goods Obtained by Embezzlement, False Pretenses, Robbery, etc.

In some states, by statute, it is made a substantive offense to receive goods that have been obtained by embezzlement, false pretenses, robbery, burglary, etc., knowing them

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Davis, 6 Car. & P. 177; State v. Rushing, 69 N. C. 29, 12 Am. Rep. 641; Com. v. Bean, 117 Mass. 141; U. S. v. Lowenstein, 21 D. C. 515.

In Illinois, the statute punishes any one who, "for his own gain, or to prevent the owner from again possessing his property," shall buy, receive, or aid in concealing stolen goods, knowing them to have been stolen. Under this statute, the accused must have received the goods for his own gain, or to prevent the owner from again possessing them. See Aldrich v. People, 101 Ill. 16.

[607] Wright v. State, 5 Yerg. (Tenn.) 154, 26 Am. Dec. 258; Cassels v. State, 4 Yerg. (Tenn.) 149. See, also, People v. Wiley, 3 Hill (N. Y.) 194.

to have been so obtained.[608] What has been said in the preceding sections with reference to receiving stolen goods applies generally to prosecutions under such a statute. It must be shown that the property was obtained under circumstances constituting, in fact and in law, the offense of embezzlement, false pretenses, robbery, burglary, etc., as the case may be; and it must be shown that the accused, when he received them, knew that they had been so obtained.

387. Aiding in Concealment of Stolen Property.

By statute in some states, it is made a substantive offense to aid in the concealment of stolen property, knowing the same to have been stolen.[609] A person is guilty of aiding in the concealment of stolen property, within the meaning of such a statute, if he does any act which will assist the thief to convert it to his use, or which will assist in preventing its recovery by the owner. It is not necessary that the property shall have been actually hidden or secreted anywhere.[610] The

[608] See State v. Lane, 68 Iowa, 384.

[609] See People v. Reynolds, 2 Mich. 422; State v. St. Clair, 17 Iowa, 149.

[610] People v. Reynolds, 2 Mich. 422.

statutes in express terms make knowledge that the property was stolen an essential element of the offense, and what has been said, therefore, in dealing with the receiving of stolen property, knowing it to have been stolen, applies here.[611]

VI. MALICIOUS MISCHIEF.

388. In General.—The offense known as "malicious mischief" is the malicious injuring or destroying of the property of another. It is a misdemeanor at common law, but from an early day it has been punished by statute in England, and it is very generally punished by statutes in this country.

389. Statutes.

Beginning with the statute of Westminster I., 13 Edw. I. § 46, and up to 24 & 25 Vict. c. 97, statutes have been enacted in England from time to time punishing, either as a felony or as a misdemeanor, malicious injuries to various kinds of property, as buildings, manufactures and materials,[612] machinery,[613] trees, shrubs, vegetables,

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[611] Ante, § 383.

[612] See 24 & 25 Vict. c. 97, §§ 13, 14; Rex v. Woodhead, 1 Mood. & R. 549; Reg. v. Smith, 6 Cox, C. C. 198; Rex v. Tacey, Russ. & R. 452; Reg. v. McGrath, 14 Cox, C. C. 598.

[613] 24 & 25 Vict. c. 97, § 15; Reg. v. Fisher, 10

fences, etc.,[614] mines and mining apparatus and machinery,[615] sea or river banks, walls, wharves, and similar works,[616] railways and telegraphs,[617] books, manuscripts, etc., in libraries and museums,[618] cattle and other animals, [619] and vessels.[620] And there is a

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Cox, C. C. 146, L. R. 1 C. C. 7; Rex v. Mackerel, 4 Car. & P. 448.

[614] 24 & 25 Vict. c. 97, §§ 19-24; Rex v. Taylor, Russ. & R. 373.

[615] 24 & 25 Vict. c. 97, §§ 26-29; Reg. v. Whittingham, 9 Car. & P. 235; Reg. v. Norris, 9 Car. & P. 241; Reg. v. Matthews, 14 Cox, C. C. 9.

[616] 24 & 25 Vict. c. 97, §§ 30-32.

[617] 24 & 25 Vict. c. 97, §§ 32-37; Reg. v. Upton, 5 Cox, C. C. 298; Reg. v. Hadfield, L. R. 1 C. C. 253, 11 Cox, C. C. 574; Reg. v. Gilmore, 15 Cox, C. C. 85.

[618] 24 & 25 Vict. c. 97, § 39.

[619] 24 & 25 Vict. c. 97, § 40; Rex v. Owens, 1 Mood. C. C. 205; Rex v. Haughton, 5 Car. & P. 559; Rex v. Haywood, 2 East, P. C. 1076, Russ. & R. 16; Reg. v. Bullock, L. R. 1 C. C. 115, 11 Cox, C. C. 125.

"Cattle" includes horses, mares, geldings, and colts, Rex v. Paty, 2 East, P. C. 1074, 1 Leach, C. C. 72; Rex v. Moy, 2 East, P. C. 1076; Rex v. Mott, 2 East, P. C. 1075, 1 Leach, C. C. 73, note; Rex v. Haywood, 2 East, P. C. 1076, Russ. & R. 16; asses, Rex v. Whitney, 1 Mood. C. C. 3; and pigs, Rex v. Chapple, Russ. & R. 77.

[620] 24 & 25 Vict. c. 97, §§ 42-47.

general section in the present statute punishing malicious injury to "any real or personal property whatsoever, either of a public or private nature," for which no punishment is otherwise provided.[621]

In this country, perhaps, there is no state in which the subject is so minutely and specifically covered by the statutes, but, no doubt, in all states there are statutes more or less like the English statutes, or particular sections of the statute of 24 & 25 Viet. c. 97, punishing, in some cases as a felony, and in others as a misdemeanor only, willful and malicious injury to private and public property.

390. Common Law.

Since the subject of malicious injury to property has from a very early day been entirely covered by statute in England, there are no English precedents of indictments for such an offense at common law. This, however, is not sufficient reason for holding that

[621] 24 & 25 Viet. c. 97, § 51; White v. Feast, L. R. 7 Q. B. 353. This section applies only to tangible property. It does not apply to a mere incorporeal right. Laws v. Eltringham, 8 Q. B. Div. 283, 15 Cox, C. C. 22.

malicious injury to the personal property of another is not a common-law offense,[622] and there are decisions in this country holding that it is a misdemeanor at common law, not only because it is an outrage upon the feelings of the community, but also because the direct tendency of such an act is to provoke violent retaliation and cause a breach of the public peace.[623] Thus, it has been held a misdemeanor, independently of any statute, to wickedly and maliciously maim or kill a

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[622] Blackstone said that acts of malicious injury to property were not crimes at common law. 4 Bl. Comm. 243. But this may well have been because statutes were enacted in England to cover the whole subject. See Ranger's Case, 2 East, P. C. 1074.

[623] Respublica v. Teischer, 1 Dall. (Pa.) 335, Beale's Cas. 108; People v. Smith, 5 Cow. (N. Y.) 258; State v. Robinson, 3 Dev. & B. (N. C.) 130, 32 Am. Dec. 661; Loomis v. Edgerton, 19 Wend. (N. Y.) 419; and see State v. Watts, 48 Ark. 56, 3 Am. St. Rep. 216; Snap v. People, 19 Ill. 79.

In Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, Beale's Cas. 119, it was held that maliciously discharging a gun, after being warned of the circumstances and danger, and thereby causing a woman to have convulsions, resulting in death, was indictable at common law as a wanton act of mischief.

domestic animal.[624] There are some decisions against this view.[625]

It seems not to be a misdemeanor at common law, but a mere trespass, to maliciously injure or destroy the real property of another, as to girdle fruit trees on another's land,[626] or to break the windows in another's house.[627] But in Pennsylvania it was held

[624] Respublica v. Teischer, 1 Dall. (Pa.) 335, Beale's Cas. 108; People v. Smith, 5 Cow. (N. Y.) 258; Com. v. Leach, 1 Mass. 59; State v. Scott, 2 Dev. & B. (N. C.) 35. And see Boyd v. State, 2 Humph. (Tenn.) 39. See, also, Com. v. Falvey, 108 Mass. 304.

[625] State v. Wheeler, 3 Vt. 344, 23 Am. Dec. 212. And see Black v. State, 2 Md. 376; State v. Beekman, 27 N. J. Law, 124. But see State v. Briggs, 1 Ark. (Vt.) 226.

In North Carolina it was held that destruction of property with malice towards the owner was a misdemeanor at common law. State v. Simpson, 2 Hawks (N. C.) 460; State v. Scott, 2 Dev. & B. (N. C.) 35; State v. Latham, 13 Ired. (N. C.) 33; State v. Jackson, 12 Ired. (N. C.) 329. But mere wounding of an animal, or other injury to property short of its destruction, though malicious, was held not to be indictable. State v. Manuel, 72 N. C. 201, 21 Am. Rep. 455; State v. Allen, 72 N. C. 114. So, also, in New Jersey. State v. Beekman, 27 N. J. Law, 124.

[626] Brown's Case, 3 Greenl. (Me.) 177.

[627] Kilpatrick v. People, 5 Denio (N. Y.) 277.

a misdemeanor at common law to maliciously injure a tree on public ground, which was useful to the public for ornament and shade.[628]

Certainly, an act of malicious mischief, whether directed against real or personal property, is indictable at common law, if accompanied by circumstances making it a breach of the public peace.[629]

391. Malice.

Both at common law, where malicious mischief is recognized at all as a common-law offense, and under the various statutes on the subject, the injury must be inflicted maliciously. Malice is an essential element of the offense, and the term as applied to this offense means something more than intentional.[630] According to Blackstone, the mis-

[628] Com. v. Eckert, 2 Brown (Pa.) 249, Beale's Cas. 110.

[629] Henderson v. Com., 8 Grat. (Va.) 708. See Com. v. Taylor, 5 Bin. (Pa.) 277. And see post, § 417, et seq.

[630] Ante, § 62, and cases and quotations in the notes; 4 Bl. Comm. 243; Rex v. Kelly, 1 Craw. & D. 186, Beale's Cas. 182; Reg. v. Pembliton, L. R. 2 C. C. 119, 12 Cox, C. C. 607, Beale's Cas. 210; Rex v. Mogg, 4 Car. & P. 364; Com. v. Walden, 3 Cush. (Mass.) 558; State v. Hill, 79 N. C. 656;

chief must be done "either out of a spirit of wanton cruelty or black and diabolical revenge." [631] The offense is not committed if the injury is done unintentionally, even though there may have been some other wrongful intent. Thus, it was held in an English case that a conviction for maliciously killing a horse could not be sustained, where the evidence showed that the accused shot at the prosecutor and killed his horse.[632] Nor will an indictment lie for malicious mischief where the injury is done under a *bona fide* claim of right,[633] or in defense of the person or property of the party inflicting it, as where a trespassing animal or vicious and attacking dog is injured or killed.[634]

Duncan v. State, 49 Miss. 331; Thompson v. State, 51 Miss. 353; State v. Pierce, 7 Ala. 728; Northcot v. State, 43 Ala. 330; Wright v. State, 30 Ga. 325; Branch v. State, 41 Tex. 622.

[631] 4 Bl. Comm. 243.

[632] Rex v. Kelly, 1 Craw. & D. 186, Beale's Cas. 182. And see Reg. v. Pembliton, L. R. 2 C. C. 119, 12 Cox, C. C. 607, Beale's Cas. 210; Com. v. Walden, 3 Cush. (Mass.) 558.

[633] See Reg. v. Matthews, 14 Cox, C. C. 5; Palmer v. State, 45 Ind. 388; Lossen v. State, 62 Ind. 437; Goforth v. State, 8 Humph. (Tenn.) 37; Sattler v. People, 59 Ill. 68.

[634] Reg. v. Prestney, 3 Cox, C. C. 505; Hanway

Under some of the statutes, and at common law, it has been held that the malice must be directed against the owner or possessor of the property, and that mere cruelty or general malice and wantonness is not enough.[635] The contrary, however, has been held in some jurisdictions.[636]

VII. FORGERY AND UTTERING.

392. Definition.—At common law, forgery is the false making, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.[637] It is a misdemeanor at common law, but

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v. Boultbee, 4 Car. & P. 350, 1 Mood. & R. 15; Wright v. State, 30 Ga. 325.

[635] Rex v. Austen, Russ. & R. 490; State v. Robinson, 3 Dev. & B. (N. C.) 130; State v. Latham, 13 Ired. (N. C.) 33; State v. Hill, 79 N. C. 656; Stone v. State, 3 Heisk. (Tenn.) 457; State v. Wilcox, 3 Yerg. (Tenn.) 278, 24 Am. Dec. 569; State v. Pierce, 7 Ala. 728; Northcot v. State, 43 Ala. 330; Hobson v. State, 44 Ala. 380; Duncan v. State, 49 Miss. 331.

[636] Reg. v. Tivey, 1 Car. & K. 704, 1 Den. C. C. 63; Reg. v. Welch, 1 Q. B. Div. 23, 13 Cox, C. C. 121; Mosely v. State, 28 Ga. 190; State v. Avery, 44 N. H. 392.

[637] 2 Bish. New Crim. Law, § 533.

"Every one commits a misdemeanor who forges any document by which any other person may be injured, or utters any such document,

in most jurisdictions it has been made a felony by statute. To constitute the offense—

1. **There must be a false making of some instrument. This may consist in a material alteration.**
2. **The instrument, as made, must be apparently capable of defrauding.**
3. **There must be an intent to defraud.**

Uttering a forged instrument, knowing it to be forged, and with intent to defraud, is a misdemeanor at common law.

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knowing it to be forged, with intent to defraud, whether he effects his purpose or not." Steph. Dig. Crim. Law, art. 366.

"Forgery is the fraudulent falsifying of an instrument, to another's prejudice." 1 Whart. Crim. Law, § 653.

Blackstone defines forgery at common law as "the fraudulent making or alteration of a writing, to the prejudice of another's right." 4 Bl. Comm. 247. See, also, 2 East, P. C. 861; Rex v. Coogan, 2 East, P. C. 949; Rex v. Jones, 2 East, P. C. 991; Com. v. Ray, 3 Gray (Mass.) 441.

In Reg. v. Epps, 4 Fost. & F. 81, Willes, J., said: "Forgery consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document, as it appears on the face of it, when in fact there is no such genuine document really in existence as it appears on the face of it to be."

In State v. Wooderd, 20 Iowa, 541, Judge Dillon said: "The making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery."

393. The Subject of Forgery.

There is no doubt that *any writing* whatever may be the subject of forgery, provided it is of such a nature that it may prejudice another's legal rights. Blackstone defines forgery at common law as "the fraudulent making or alteration of a writing to the prejudice of another's rights," without limiting it to any particular kind of writing.[638] And Judge Dillon defined it as "the making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced." [639] To show the broad scope of the offense in this respect, some of the instruments which have been held to be the subject of forgery are referred to in the note below.[640] The word "writing" in the definition of forgery does not mean writing in the popular sense only, as writing with a pen or pencil. It includes instruments printed

[638] 4 Bl. Comm. 247.

[639] State v. Woodard, 20 Iowa, 541. See, also, 2 East, P. C. 861; Bac. Abr. "Forgery," B.; Reg. v. Boult, 2 Car. & K. 604; Com. v. Ray, 3 Gray (Mass.) 441.

[640] Promissory notes: Rex v. Marshall, Russ. & R. 75; State v. Hayden, 15 N. H. 355; State v.

or engraved, as railroad tickets, corporation bonds, etc.[641]

Whether Restricted to Writings.—All the old definitions of forgery use the word "writ-

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Stratton, 27 Iowa, 420, 1 Am. Rep. 282; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474.

Bills of exchange: Reg. v. Blenkinsop, 1 Den. C. C. 280, 2 Car. & K. 531, 2 Cox, C. C. 420.

Acceptances: Reg. v. Mitchell, 1 Den. C. C. 282.

Indorsements on note or bill: Mead v. Young, 4 Term R. 28; Rex v. Bolland, 2 East, P. C. 958, 1 Leach, C. C. 83; Rex v. Birkett, Russ. & R. 251.

Duebill: Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639.

Orders or requests for the payment or loan or gift of money: Com. v. Ayer, 3 Cush. (Mass.) 150; Thomas v. State, 59 Ga. 784; Jones v. State, 50 Ala. 161; Williams v. State, 61 Ala. 33.

Orders for goods: Hale v. State, 1 Cold. (Tenn.) 167, 78 Am. Dec. 488; Hobbs v. State, 75 Ala. 1.

Deeds, mortgages, etc.: Reg. v. Ritson, L. R. 1 C. C. 200; State v. Fisher, 65 Mo. 437; People v. Sharp, 53 Mich. 523.

Policies of insurance: People v. Graham, 6 Park. Cr. R. (N. Y.) 135.

Receipts and other acquittances: Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; State v. Floyd, 5 Strobh. (S. C.) 58; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

A physician's certificate of sickness for the

ing," and according to the weight of authority, writings or documents only are the subject of this offense.[642] For this reason it is not forgery to paint an artist's name in the corner of a picture, in order to pass it off as an original picture by that artist,[643] or to have wrappers for goods printed in imitation of those used by another manufacturer, with intent to deceive and defraud purchasers.[644] In an English case there was an indictment and conviction for making on a glass plate, by means of photography, an impression of an undertaking of a foreign state for the payment of money; but this was under a

purpose of obtaining money from a mutual benefit society: Com. v. Ayer, 3 Cush. (Mass.) 153.

Railroad ticket or pass: Com. v. Ray, 3 Gray (Mass.) 441; Reg. v. Boult, 2 Car. & K. 604.

Books of account and pass books, see post, § 396e.

Letters of recommendation, etc., see post, § 396f.

[641] Rex v. Dade, 1 Mood. C. C. 307; Com. v. Ray, 3 Gray (Mass.) 441; People v. Rhoner, 4 Park. Cr. R. (N. Y.) 166.

[642] Reg. v. Closs, Dears. & B. C. C. 460, 7 Cox, C. C. 494.

[643] Reg. v. Closs, supra.

[644] Reg. v. Smith, Dears. & B. C. C. 566, 4 Jur. (N. S.) 1003, 8 Cox, C. C. 32.

statute expressly covering such cases, and the case is no authority on the subject of forgery at common law.[645]

Statutes.—In England, statutes have been enacted covering the whole subject of forgery, specifying the particular instruments that are the subject of forgery, and making almost every conceivable instrument the subject of the offense. And in this country, also, there are statutes in most states, if not in all, punishing as forgery the false making of particular instruments. If an instrument does not fall within the terms of a statute, and the statute is not intended to cover the whole field, and to entirely repeal the common law,[646] an indictment for its forgery may still be maintained as a common-law indictment.[647]

394. False Making of Instrument.

(*a*) *In General.*—To constitute forgery at common law, there must be a *false making* of an instrument. Mere fraud and false pre-

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[645] Reg. v. Rinaldi, Leigh & C. 330 (under the statute of 24 & 25 Vict. c. 98, § 19).

[646] Ante, § 14.

[647] See Com. v. Ray, 3 Gray (Mass.) 441; People v. Shall, 9 Cow. (N. Y.) 778.

tenses are not enough. The instrument must be false. It must be made to appear to be other than it really is.[648] It is forgery to sign another man's name to a note, without authority, and with intent to defraud, and thus make the instrument appear to be the note of the person whose name is signed, but it is not forgery for a person to sign his own name to an instrument, and falsely and fraudulently represent that he has authority to bind another by doing so,[649] or for a person to sign another's name "by" himself as attorney in fact,[650] for in such a case the instrument is not falsely made, but is just what it purports to be, and the signer is guilty of false pretenses only. The same is true of a receipt. It is not forgery for a person to falsely and fraudulently represent that he has authority to receive money for another, and to sign, not the other's name, but his

[648] Reg. v. White, 1 Den. C. C. 208; Rex v. Arscott, 6 Car. & P. 408; People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; State v. Young, 46 N. H. 266, 88 Am. Dec. 212; Com. v. Baldwin, 11 Gray (Mass.) 197, 71 Am. Dec. 703; State v. Willson, 28 Minn. 52.

[649] Reg. v. White, 1 Den. C. C. 208.

[650] State v. Willson, 28 Minn. 52.

own, to the receipt for the money.[651] On the same principle it has been held that a man does not commit forgery in signing the name of a pretended firm, and falsely representing that there is such a firm composed of himself and another.[652]

(*b*) *False Writing in One's Own Name.*—A person, however, may be guilty of forgery in making a *false* instrument in his own name. Thus, in an English case, it was said that "every instrument which purports to be what it is not, whether executed by a person who is not the person purporting to execute it, or bearing a date which is not the true date, is a forgery," and it was held to be forgery for the grantor in a deed to antedate the same for the purpose of defrauding another.[653]

(*c*) *Using One's Own Name as That of Another.*—It is also a forgery for a person to sign his own name to an instrument with a fraudulent intent to have the instrument

[651] Rex v. Arscott, 6 Car. & P. 408.

[652] Com. v. Baldwin, 11 Gray (Mass.) 197, 71 Am. Dec. 703. It would seem that this is forgery, on the ground that it is the use of a fictitious name. See post, p. 908.

[653] Reg. v. Ritson, L. R. 1 C. C. 200.

received as executed by another person having the same name.[654] It was so held in an English case, where the accused, having obtained possession of a bill payable to another person of the same name, fraudulently indorsed and negotiated it.[655] There are similar cases in this country.[656]

(*d*) *Using Fictitious or Assumed Name.* —Forgery may be committed by signing a fictitious or assumed name, if it be done with intent to defraud, for this is the false making of an instrument.[657] Thus, it has been

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[654] Mead v. Young, 4 Term. R. 28; Parkes' Case, 2 Leach, C. C. 775, 2 East, P. C. 963; People v. Peacock, 6 Cow. (N. Y.) 72; Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353.

[655] Mead v. Young, 4 Term R. 28.

[656] See People v. Peacock, 6 Cow. (N. Y.) 72, where a man was held guilty of forgery in fraudulently indorsing, with his own name, a permit for the delivery of coal, when he knew that the real consignee was another person of the same name. See, also, Graves v. American Exch. Bank, 17 N. Y. 205.

[657] Lewis' Case, Fost. C. L. 116; Rex v. Shepherd, 2 East, P. C. 967, 1 Leach, C. C. 226; Rex v. Bolland, 2 East, P. C. 958, 1 Leach, C. C. 83; Reg. v. Rogers, 8 Car. & P. 629; Reg. v. Ashby, 2 Fost. & F. 560; U. S. v. Mitchell, Baldw. 366, Fed. Cas.

held that a person is guilty of forgery if he fraudulently indorses a bill or note by signing a fictitious name, and negotiates the same, representing that the indorsement is by a man of credit;[658] or if he makes a note in the name of a fictitious bank;[659] or if, with intent to defraud, he assumes a name, and executes a note in such name and negotiates the same.[660] In such cases, however, the credit must have been given, not to the accused, but to the name.[661]

(*e*) *Genuine Signature of Third Person.* —Forgery may also be committed by procuring the genuine signature of another to an instrument with the fraudulent intent to pass the instrument as that of a different person

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No. 15,787; State v. Hayden, 15 N. H. 355; Brown v. People, 8 Hun (N. Y.) 562, 72 N.Y. 571, 28 Am. Rep. 183.

[658] Rex v. Bolland, 2 East, P. C. 958, 1 Leach, C. C. 83.

[659] State v. Hayden, 15 N. H. 355.

[660] Rex v. Marshall, Russ. & R. 75; Rex v. Whiley, Russ. & R. 90; Rex v. Francis, Russ. & R. 209.

[661] Reg. v. Martin, L. R. 1 C. C. 214, 49 L. J. C. C. 11. See 21 Alb. Law J. 91; 1 Crim. Law Mag. 266.

having the same name.[662] Thus, it has been held to be forgery to get another to accept a bill in his true name, intending at the time to represent such name to be the name of another person, for the purpose of fraud,[663] or to put an address to the name of the drawer of a bill, while the bill is in the course of completion, with intent to make the name appear to be that of a different person.[664]

(*f*) *Obtaining Another's Signature by Fraud.*—According to the decided weight of authority, it is not forgery to obtain a person's signature to an instrument by means of false and fraudulent representations as to its contents, or as to the purpose for which the

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[662] Reg. v. Mitchell, 1 Den. C. C. 282. And see Reg. v. Blenkinsop, 1 Den. C. C. 280, 2 Car. & K. 531, 2 Cox, C. C. 420; Reg. v. Epps, 4 Fost. & F. 81; Reg. v. Mahoney, 6 Cox, C. C. 487; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774; Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49.

The names need not be precisely the same. Reg. v. Mahoney, supra. Compare Rex v. Story, Russ. & R. 81.

[663] Reg. v. Mitchell, 1 Den. C. C. 282.

[664] Reg. v. Blenkinson, 1 Den. C. C. 280, 2 Car. & K. 531, 2 Cox, C. C. 420.

instrument is to be used.[665] Nor is it forgery to fraudulently procure a person's signature to an instrument which has previously been altered without his knowledge.[666]

395. Manner of Making Instrument.

(*a*) *In General.*—The manner in which the false instrument is made is immaterial. It may be by writing with a pencil,[667] and though the writing may be dim, [668] as well as by writing with a pen. It may be by printing or engraving.[669] Thus, the false making of a railroad pass or ticket is forgery, though the whole instrument, including the signature, is printed or engraved.[670] And it may be by making a mark as and for the signature of another.[671]

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[665] Reg. v. Collins, 2 Mood. & R. 461; Reg. v. Chadwick, 2 Mood. & R. 545; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441; Com. v. Sankey, 22 Pa. St. 390. Contra, State v. Shurtliff, 18 Me. 368.

[666] Reg. v. Chadwick, 2 Mood. & R. 545.

[667] Baysinger v. State, 77 Ala. 63.

[668] Baysinger v. State, 77 Ala. 63.

[669] Rex v. Dade, 1 Mood. C. C. 307; Com. v. Ray, 3 Gray (Mass.) 441; People v. Rhoner, 4 Park. Cr. R. (N. Y.) 166.

[670] Reg. v. Boult, 2 Car. & K. 604; Com. v. Ray, 3 Gray (Mass.) 441.

[671] Rex v. Dunn, 2 East, P. C. 962, 1 Leach, C. C. 57; State v. Robinson, 16 N. J. Law, 507.

(*b*) *Alteration of Instruments.*—The expression "false making" in the definition of forgery includes the fraudulent alteration of instruments. It is forgery to alter a genuine instrument in a material part, with intent to defraud, as by increasing the amount of a bill or note;[672] changing a receipt from an acknowledgment of part payment to an acknowledgment of payment in full;[673] changing the date of a receipt so as to make it cover other claims than those intended;[674] changing the date of a bill or note that has been paid,[675] or the date of an insurance policy;[676] changing an indorsement on a bill or note so as to make it general instead of special;[677] or tearing off a condition attached to a note, so as to render it negotiable.[678]

[672] Rex v. Teague, Russ. & R. 33. 2 East, P. C. 979; Rex v. Elsworth, 2 East, P. C. 986; Rex v. Post, Russ. & R. 101; Haynes v. State, 15 Ohio St. 455; State v. Waters, 3 Brev. (S. C.) 507; State v. Schwartz, 64 Wis. 432.

[673] State v. Floyd, 5 Strobh. (S. C.) 58.

[674] Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601. And see State v. Kattlemann, 35 Mo. 105; State v. Maxwell, 47 Iowa, 454.

[675] Rex v. Atkinson, 7 Car. & P. 669.

[676] People v. Graham, 6 Park. Cr. R. (N. Y.) 135.

[677] Rex v. Birkett, Russ. & R. 251.

[678] State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282.

Immaterial Alterations.—To constitute forgery, the alteration of an instrument must be in a material matter, as in the cases above mentioned. An immaterial alteration is not forgery, though made with a fraudulent intent. Thus, it has been held that it is not forgery, whatever the intent may be, to sign a person's name to an instrument as a witness, when the instrument is of such a character that it does not require a witness;[679] to alter the terms of a written contract so as to make it correspond with the intention of the parties at the time it was executed,[680] etc.

(*c*) *Filling Blanks.*—When an instrument is executed in blank, it is forgery to fraudulently fill in a blank so as to make the instrument different from what is intended.[681] For example, if a person having the blank acceptance of another is authorized to

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[679] State v. Gherkin, 7 Ired. (N. C.) 206.

[680] Pauli v. Com. 89 Pa. St. 432, 7 W. N. C. (Pa.) 396, 1 Crim. Law Mag. 126.

[681] Rex v. Hart, 1 Mood. C. C. 486, 7 Car. & P. 652; Reg. v. Wilson, 1 Den. C. C. 284, 2 Cox, C. C. 426, 2 Car. & K. 527; State v. Kroeger, 47 Mo. 552; Biles v. Com., 32 Pa. St. 529, 75 Am. Dec. 568; State v. Flanders, 38 N. H. 324. Contra, Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427.

write on it a bill of exchange for a limited amount, and he writes a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, he is guilty of forgery.[682] The same is true where a person receives a check signed in blank, with directions to fill in a certain amount, and he fraudulently fills in a larger amount.[683]

396. Validity and Legal Efficacy of Instrument.

(*a*) *In General.*—To constitute forgery, the instrument, as made, must have a tendency to defraud, or prejudice the rights of another, and it must therefore have at least an apparent "legal efficacy."[684] For this reason the false making of an instrument which is clearly void on its face is not forgery.[685] And it is not forgery to make a re-

[682] Rex v. Hart, 1 Mood. C. C. 483, 7 Car. & P. 652.

[683] Reg. v. Wilson, 1 Den. C. C. 284, 2 Cox, C. C. 426, 2 Car. & K. 527.

[684] 2 Bish. New Crim. Law, § 533; Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; People v. Shall, 9 Cow. (N. Y.) 778; Com. v. Henry, 118 Mass. 460; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

[685] It is not forgery, for example, to sign another's name to a check, where the check is not

lease of all claims of a certain person, where such person has no claims.[686] Thus, the making or altering of a receipt of payment of a debt after the creditor has made an assignment in bankruptcy is not forgery, for the assignment vests the right of action on the debt in the assignee, and no acquittance by the bankrupt can have any effect.[687]

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made payable to any person, nor to the order of any person, nor to bearer. Williams v. State, 51 Ga. 535. See, also, Wall's Case, 2 East, P. C. 953; Rex v. Pateman, Russ. & R. 455; People v. Shall, 6 Cow. (N.Y.) 778; State v. Pierce, 8 Iowa, 231; State v. Wheeler, 19 Minn. 98; Rollins v. State, 22 Tex. App. 548, 58 Am. Rep. 659; Waterman v. People, 67 Ill. 91; State v. Humphreys, 10 Humph. (Tenn.) 442.

It is not forgery to falsely and fraudulently make a will which is void on its face because of its not being attested by the number of witnesses required by statute, Wall's Case, 2 East, P. C. 953; or a note or other agreement which is void because it fails to express a consideration, where this is necessary, or to specify any amount, etc., Rex v. Burke, Russ. & R. 496; People v. Shall, 9 Cow. (N. Y.) 778; or an acceptance on a bill of exchange which is void for noncompliance with a statute, Moffatt's Case, 2 East, P. C. 954, 1 Leach, C. C. 433.

[686] Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

[687] Id.

(*b*) *Apparent Validity or Efficacy.*—It is not necessary that the instrument shall have any *real* validity or legal efficacy. It is sufficient if it has such an apparent legal efficacy that it may deceive and defraud.[688]

(*c*) *Similitude of Instrument.*—It has been held that the false instrument, to constitute forgery, must bear such a resemblance to the genuine instrument, or to what it would be if genuine, that it might deceive a person of ordinary caution and observation.[689] But it is not necessary that the resemblance shall be so close that the instrument might deceive persons of experience,[690] or that it might deceive on close inspection.[691] Thus, in a Massachusetts case it was held that signing

[688] See Reg. v. Pike, 2 Mood. C. C. 70, 3 Jur. 27: State v. Coyle, 41 Wis. 267; State v. Pierce, 8 Iowa, 231; State v. Johnson, 26 Iowa, 407.

[689] See Dement v. State, 2 Head (Tenn.) 505, 75 Am. Dec. 747; Garmire v. State, 104 Ind. 444; State v. Covington, 94 N. C. 913, 55 Am. Rep. 650; Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154.

[690] Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Garmire v. State, 104 Ind. 444.

[691] See State v. Robinson, 16 N. J. Law, 510.

another's name to a check on a bank may be a forgery, although the signature may not be so much like the genuine signature as to be likely to deceive the officers of the bank. "It is not necessary," it was said, "that there should be so close a resemblance to the genuine handwriting of the party whose name is forged as would impose on persons having particular knowledge of the handwriting of such party; nor is it necessary that the officers of the bank upon which a check purports to have been drawn would probably have been misled and deceived by it. The intent to defraud the bank may exist, though the officers of the bank, from their better acquaintance with the genuine handwriting of the drawer, would readily have detected the check as a counterfeit one." [692] The fact that the name is misspelled does not prevent the fraudulent signing of another's name from being a forgery.[693]

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[692] Com. v. Stephenson, 11 Cush. (Mass.) 481, 59 Am. Dec. 154.

[693] Gooden v. State, 55 Ala. 178 (where the name "Thweatt" was spelled "Threet"); Baysinger v. State, 77 Ala. 63 (where the name "McGowen" was spelled "McGowe"). See, also, State v. Covington, 94 N. C. 913, 55 Am. Rep. 650.

(*d*) *Efficacy Dependent upon Extrinsic Facts.*—It is not necessary that the efficacy of the instrument shall be apparent upon its face. It may depend upon extrinsic facts. As was said in an Alabama case: "When the instrument does not appear to have any legal validity, nor show that another might be injured by it, but extrinsic facts exist by which the holder of the paper might be enabled to defraud another, then the offense is complete; and an indictment averring the extrinsic facts, disclosing its capacity to deceive and defraud, will be supported. The fact that the paper is incomplete and imperfect in itself, and that without the knowledge of extrinsic facts it does not appear that it has the vicious capacity, only renders it necessary that the indictment should aver the extrinsic facts." [694]

(*e*) *False Entries in Books of Account.*—A person is not guilty of forgery in making

[694] Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639. In this case the entire instrument charged to have been forged was: "Due 8.25 Askew Brothers." There was a conviction, and, after an elaborate consideration, it was sustained.

There are many other cases which support the text. See Baysinger v. State, 77 Ala. 63.

false entries in his own books of account, though his purpose may be to defraud,[695] except, perhaps, where the book is a book of original entry which is admissible in evidence to prove claims.[696] But it is forgery to fraudulently make a false entry, or fraudulently alter an entry, in a bank pass book,[697] or, it seems, in pass books with grocers and other tradesmen.[698] And false entries fraudulently made by employes in the books of their employers may constitute forgery.[699]

(*f*) *Recommendations and Certificates of Character.*—A letter recommending another as a person of financial standing and responsibility may impose a legal liability if false, and therefore such a letter is clearly the sub-

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[695] State v. Young, 46 N. H. 266, 88 Am. Dec. 212.

[696] 1 Whart. Crim. Law, § 666.

[697] Reg. v. Smith, Leigh & C. 168, 9 Cox, C. C. 162; Reg. v. Moody, Leigh & C. 173, 9 Cox, C. C. 166; Reg. v. Dodd, 18 Law Times (N. S.) 89; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601.

[698] 1 Whart. Crim. Law, § 664.

[699] Biles v. Com. 32 Pa. St. 529, 75 Am. Dec. 568; People v. Phelps, 49 How. Prac. (N. Y.) 462. But see In re Windsor, 6 Best & S. 522, 10 Cox, C. C. 118, 11 Jur. (N. S.) 807.

ject of forgery.[700] In England it has been held that it is forgery at common law to fraudulently make, in another's name, false certificates or testimonials of character, for the purpose of obtaining a situation as a police constable[701] or schoolmaster.[702] To forge a certificate of service, sobriety, and good conduct at sea, with intent to deceive and defraud, has also been held to be indictable at common law.[703] It seems, however, that the false making of a mere complimentary letter of introduction, or of certificates of character which confer no right and impose no duty, is not forgery.[704]

397. Fraudulent Intent.

To constitute forgery, a fraudulent intent is always essential. There must not only be

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[700] See Ames' Case, 2 Greenl. (Me.) 365. Compare, however, the cases cited in note 704, infra.

[701] Reg. v. Moah, Dears. & B. C. C. 550, 7 Cox, C. C. 503.

[702] Reg. v. Sharman, Dears. C. C. 285, 6 Cox, C. C. 212.

[703] Reg. v. Toshack, 1 Den. C. C. 492, 4 Cox, C. C. 38.

[704] Waterman v. People, 67 Ill. 91; Com. v. Hinds, 101 Mass. 209; Com. v. Chandler, Thach. C. C. (Mass.) 187; Mitchell v. State, 56 Ga. 171; Foulke's Case, 2 Rob. (Va.) 836.

a false making of an instrument, but it must be with intent to defraud.[705] It follows that a person is not guilty of forgery in signing another's name to a note or other instrument, if he believes that he has authority to do so, though he may in fact have no authority.[706] If there is no such authority, however, and no belief that there is, one who signs another's name to an instrument is none the less guilty of forgery because he believes

[705] Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; Rex v. Forbes, 7 Car. & P. 224; Reg. v. Parish, 8 Car. & P. 94; Rex v. Bontien, Russ. & R. 260; Com. v. Ladd, 15 Mass. 526; Com. v. Foster, 114 Mass. 311, 19 Am. Rep. 353; Fox v. People, 95 Ill. 71; People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; Parmelee v. People, 8 Hun (N. Y.) 623; Com. v. Sankey, 22 Pa. St. 390, 60 Am. Dec. 91; Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302; Montgomery v. State, 12 Tex. App. 323; State v. Eades, 68 Mo. 150, 30 Am. Rep. 780; State v. Washington, 1 Bay (S. C.) 120, 1 Am. Dec. 601; State v. Floyd, 5 Strobh. (S. C.) 58, 53 Am. Dec. 689; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; State v. Shelters, 51 Vt. 105, 31 Am. Rep. 679; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441.

[706] Rex v. Forbes, 7 Car. & P. 224; Reg. v. Parish, 8 Car. & P. 94; Reg. v. Beard, 8 Car. & P. 143; Parmelee v. People, 8 Hun (N. Y.) 623; Thanks v. State, 25 Tex. Supp. 326.

that the person whose name he signs will ratify his act and pay the obligation.[707] To constitute forgery by the use of a fictitious or assumed name, an intent to defraud is just as much necessary as in other cases.[708] One who signs another's name to an obligation is guilty of forgery, though he may intend ultimately to take up the instrument, and may believe that no one will be injured by his act, and even though he may himself subsequently pay the obligation.[709]

General Intent to Defraud.—In some jurisdictions it has been held that there must be a specific intent to defraud some particular person, and that a general intent to defraud is not enough.[710] In other jurisdictions it is held that a general intent to defraud will suffice.[711]

Intent may be Inferred.—The intent to

[707] Reg. v. Beard, 8 Car. & P. 143.

[708] Rex v. Bontien, Russ. & R. 260.

[709] Reg. v. Geach, 9 Car. & P. 499.

[710] Reg. v. Hodgson, Dears. & B. C. C. 3, 7 Cox, C. C. 122; Barnum v. State, 15 Ohio, 717, 45 Am. Dec. 601; Williams v. State, 51 Ga. 535. And see Reg. v. Tylney, 1 Den. C. C. 319.

[711] Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302.

defraud, while always necessary in forgery, need not necessarily be proved by direct or positive evidence. Such an intent will be inferred if the defrauding of another is the necessary effect and consequence of a forgery and utterance.[712]

398. Actual Injury not Necessary.

While an intent to defraud is always necessary to constitute forgery, it is not at all necessary that the fraud shall be in fact accomplished. The inquiry is not whether any one has been actually defrauded, but whether anyone might have been defrauded; and it is never necessary, unless expressly required by the terms of a statute, to allege or prove actual injury.[713] For this reason a person may be convicted of forging a note

[712] Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174.

[713] Reg. v. Nash, 2 Den. C. C. 493, 16 Jur. 553; Rex v. Crocker, Russ. & R. 97, 2 Leach, C. C. 987; Rex v. Ward, 2 East, P. C. 861, 2 Strange, 747, 2 Ld. Raym. 1461; Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639; Williams v. State, 61 Ala. 33; Com. v. Ladd, 15 Mass. 526; State v. Jones, 9 N. J. Law, 357, 17 Am. Dec. 483; People v. Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; Arnold v. Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302.

with intent to defraud, although the note was found in his custody when apprehended;[714] and a person may be convicted of forging and uttering an instrument with intent to defraud, though there may have been no person in a position to be defrauded by his act.[715] Falsely making an order for goods or a bill of exchange in another's name is forgery, though the order or bill may not be accepted.[716]

399. Uttering Forged Instrument.

To utter or pass a forged instrument, knowing that it is forged, is a distinct misdemeanor at common law.[717]

Knowledge and Intent.—To constitute the offense, it is not at all necessary that the utterer shall have been in any way concerned in the forgery, but it is necessary that he shall know that the instrument which he

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[714] Rex v. Crocker, Russ. & R. 97, 2 Leach, C. C. 987.

[715] Reg. v. Nash, 2 Den. C. C. 493, 16 Jur. 553.

[716] Hale v. State, 1 Cold. (Tenn.) 167, 78 Am. Dec. 488.

[717] Reg. v. Sharman, Dears. C. C. 285; Com. v. Houghton, 8 Mass. 107; Brown v. Com., 8 Mass. 59; Lewis v. Com., 2 Serg. & R. (Pa.) 551; Com. v. Speer, 2 Va. Cas. 65.

utters is forged.[718] It is also necessary that he shall intend to defraud some person,[719] but such an intent may be inferred from the circumstances, as from the fact that he knew the instrument to be a forgery, and the probable consequence of its utterance was to defraud.[720]

Actual Injury.—There is an English case in which it was held that at common law an indictment would not lie for uttering a forged instrument where no fraud was actually perpetrated,[721] but this is not the law. If an instrument is uttered with knowledge that it is forged, and with intent to defraud, and the instrument is such that it might de-

[718] U. S. v. Mitchell, Baldw. 367, Fed. Cas. No. 15,787; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Sands v. Com., 20 Grat. (Va.) 800.

[719] Rex v. Holden, Russ. & R. 154, 2 Leach, C. C. 1019, 2 Taunt. 334; Reg. v. Hodgson, Dears. & B. C. C. 3, 7 Cox, C. C. 122; Reg. v. Bradford, 2 Post. & F. 859; State v. Redstrake, 39 N. J. Law, 365.

[720] Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; Reg. v. Geach, 9 Car. & P. 499; Reg. v. Hill, 8 Car. & P. 274; Reg. v. Cooke, 8 Car. & P. 582; Reg. v. Marcus, 2 Car. & K. 356; Miller v. State, 51 Ind. 405; Com. v. Whitney, Thatch. C. C. (Mass.) 588.

[721] Reg. v. Boult, 2 Car. & K. 604.

fraud, the offense of uttering is complete, although there is no person in a position to be defrauded by the act,[722] and though no person is in fact defrauded.[723] The instrument, as we shall see, need not even be actually delivered and accepted.[724] There is an uttering of forged bank notes, although the person to whom they are delivered is an agent of the bank for the purpose of detecting utterers, and has applied to the utterer to purchase the notes.[725]

The Instrument must be a forged instrument, and therefore it must be such an instrument as may be the subject of forgery, within the rules heretofore stated,[726] and it must have a tendency to defraud, or an apparent legal efficacy.[727]

The Uttering.—To constitute this offense,

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[722] Reg. v. Nash, 2 Den. C. C. 493.

[723] Id.; People v. Caton, 25 Mich. 388; Com. v. Ladd, 15 Mass. 526; Bishop v. State, 55 Md. 138; Snell v. State, 2 Humph. (Tenn.) 347; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639.

[724] Note 730, infra.

[725] Rex v. Holden, Russ. & R. 154, 2 Leach, C. C. 1019, 2 Taunt. 334.

[726] Ante, § 393.

[727] Ante, § 396.

there must be something more than the mere possession of a forged instrument with intent to utter it.[728] There must be an actual uttering or publication, though there need not be any delivery and acceptance or actual passing of the instrument. To utter and publish an instrument is to declare or assert, directly or indirectly, either by words or actions, that the instrument is good.[729] Generally, perhaps, there is an actual passing or delivery and acceptance of the instrument, but this is not necessary. It is enough if it be merely presented or offered as genuine.[730] It has been held an uttering to offer a forged instrument in payment of goods and leave it on the counter of a shop;[731] to exhibit a forged receipt to a person for the purpose of obtain-

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[728] Com. v. Morse, 2 Mass. 138. See ante, § 117. It is otherwise by statute in many jurisdictions.

[729] 1 Whart. Crim. Law, § 703; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

[730] Rex v. Crowther, 5 Car. & P. 316; Reg. v. Radford, 1 Den. C. C. 59, 1 Car. & K. 707; Chahoon v. Com., 20 Grat. (Va.) 734; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Smith v. State, 20 Neb. 284, 57 Am. Rep. 832; People v. Caton, 25 Mich. 388; State v. Horner, 48 Mo. 520.

[731] Reg. v. Welch, 2 Den. C. C. 78, 4 Cox, C. C. 430.

ing credit, though the party refuses to part with the possession of the paper out of his hand;[732] to present a forged draft at a bank, although payment is refused;[733] to stake a forged instrument at a gaming table;[734] or to exhibit forged certificates of character for the purpose of obtaining a position.[735] Other cases are referred to in the note below.[736]

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[732] Reg. v. Radford, 1 Den. C. C. 59, 1 Car. & K. 707. Compare Rex v. Shukard, Russ. & R. 200.

[733] Rex v. Crowther, 5 Car. & P. 316.

[734] State v. Beeler, 1 Brev. (S. C.) 482.

[735] Reg. v. Sharman, Dears. C. C. 285, 6 Cox, C. C. 312.

[736] Delivering a forged instrument to a creditor conditionally: Reg. v. Cooke, 8 Car. & P. 582.

Pledging a forged instrument: Rex v. Birkett, Russ. & R. 86.

It is not an uttering to exhibit a forged check or note merely for the purpose of creating a false idea of wealth or professional standing. Rex v. Shukard, Russ. & R. 200.

CHAPTER VIII.

OFFENSES AGAINST THE HABITATION OF INDIVIDUALS.

I. BURGLARY.

400. Definition and Elements.—Burglary is one of the common-law felonies. It is the breaking and entering of the dwelling house of another by night, with intent to commit a felony, whether the intent be executed or not.[1] Five things are essential:

1. The premises must be the dwelling house of another. But the dwelling house includes outhouses within the curtilage or common inclosure.
2. There must be a breaking, and it must be of some part of the house itself. But the breaking may be constructive, as well as actual. There is a constructive breaking where an entry is effected—
   (a) By fraud or false pretenses.
   (b) By intimidation.
   (c) By conspiracy with a servant or other inmate, who opens the door.
   (d) By coming through a chimney.

[1] "A burglar," said Lord Coke, "is he that in the nighttime breaketh and entreth into a mansion house of another of intent to kill some reasonable creature, or to commit some other felony within

3. There must be an entry. But the slightest entry—as of a hand, or even of an instrument—is sufficient.
4. The breaking and entry must both be at night. But they need not be on the same night.
5. There must be an intent to commit a felony in the house, and this intent must accompany both the breaking and the entry. But the intended felony need not be committed.[2]

This definition and analysis is of burglary at common law, and does not necessarily apply to statutory burglaries or house-breakings. As we shall see later, statutes have been very generally enacted changing or adding to the common-law definition of bur-

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the same, whether his felonious intent be executed or not." 3 Inst. 63; 1 Hawk. P. C. c. 38, § 1; 4 Bl. Comm. 224; Clarke v. Com., 25 Grat. (Va.) 908.

[2] In State v. Whit, 4 Jones (N. C.) 349, it was said: "To a conviction, it is necessary to prove, first, the breaking; second, the entering; third, that the house broken and entered is a mansion house; fourth, that the breaking and entering was in the nighttime; fifth, that the breaking and entering were with intent to commit a felony. In all these particulars there must be proof satisfactory to the minds of the jury; and if the state fails upon any one point, the prisoner is entitled to an acquittal."

glary.[3] These statutes, however, must be construed in the light of the common law,[4] and they cannot be properly understood or applied without a knowledge of the elements necessary to constitute burglary at common law.

401. Character of the Premises.

(*a*) *Dwelling House.*—To be the subject of burglary at common law, the building broken and entered must, except as stated below, be a dwelling house, or mansion house,—*domus mansionalis,*—as the old books and precedents of indictments express it.[5] Burglary at common law is peculiarly an offense against the security of the *habitation,* and not an offense against the property as *property.*[6] There were two exceptions at common

[3] Post, § 409.

[4] See Finch v. Com., 14 Grat. (Va.) 643; Nicholls v. State, 68 Wis. 416; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789.

[5] 4 Bl. Comm. 224, 225; 1 Hale, P. C. 550, 556; Rex v. Lyons, 1 Leach, C. C. 185, Beale's Cas. 784; Rex v. Martin, Russ. & R. 108; Fuller v. State, 48 Ala. 273; Hollister v. Com., 60 Pa. St. 103; Scott v. State, 62 Miss. 781; State v. Clark, 89 Mo. 423.

[6] See the cases cited above.

law to the necessity for the premises to be a dwelling house. It was burglary to break and enter a church with felonious intent,[7] or to break and enter the gate or wall of a walled town with such intent.[8]

(*b*) *Outhouses within the Curtilage.*—The term "dwelling house" is used in a broad and somewhat technical sense, and includes, in addition to the dwelling proper, all outhouses which are within the curtilage or common inclosure, and which are used in connection with the dwelling proper,—as the stable, outdoor kitchen, smokehouse, offices, etc.[9] And even when there is no common

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[7] 3 Inst. 64; 1 Hale, P. C. 556; 1 Hawk. P. C. c. 38, § 17; Anon., 1 Dyer, 99a, pl. 58, Beale's Cas. 781; Reg. v. Baker, 3 Cox, C. C. 581.

Lord Coke gave as the reason, that a church is the mansion house of Almighty God; but Hale says: "This is only a quaint turn, without any argument, and seems invented to suit his definition of burglary, viz., the breaking into a mansion house." 1 Hale, P. C. 556, note. And see 1 Hawk. P. C. c. 38, § 10.

[8] 1 Hale, P. C. 556; 1 Hawk. P. C. c. 38, § 17.

[9] 1 Hale, P. C. 558; 1 Hawk. P. C. c. 38, § 12; 4 Bl. Comm. 225; Rex v. Clayburn, Russ. & R. 360; Rex v. Brown, 2 East, P. C. 487, 2 Leach, C. C. 1016, note; Rex v. Gibson, 2 East, P. C. 508, 1 Leach, C. C. 357; Fisher v. State, 43 Ala.

inclosure the dwelling house will include and protect an outhouse adjoining it and used in connection with it, as outhouses within the curtilage are generally used.[10] Buildings, however, that are entirely separated from the dwelling proper,—as where they are beyond the common inclosure, if any, or are on the other side of a public highway,—are no part of the dwelling house, and are

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17; State v. Whit, 4 Jones (N. C.) 349; Pitcher v. People, 16 Mich. 142; People v. Aplin, 86 Mich. 393. And see Quinn v. People, 71 N. Y. 561, Beale's Cas. 789; State v. Johnson, 45 S. C. 483.

"The capital house protects and privileges all its branches and appurtenances, if within the curtilage or home stall." 4 Bl. Comm. 225.

Thus, a smoke house, the front part and door of which is within the yard of the dwelling house, is the subject of burglary. Fisher v. State, supra; State v. Whit, supra.

The same is true of a barn with doors opening into the yard, and forming part of the common inclosure, situated about eight rods from the dwelling. Pitcher v. People, supra. And see People v. Taylor, 2 Mich. 250.

If the front part and front door of an outhouse —as a smokehouse, for instance—is within the common inclosure, the whole building is protected, and burglary may be committed by breaking and entering at the back. Fisher v. State, supra.

[10] Rex v. Brown, 2 East, P. C. 493.

not the subject of burglary at common law.[11] There need be no direct communication with the dwelling proper.[12]

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[11] 4 Bl. Comm. 225; Rex. v. Westwood, Russ. & R. 495; State v. Jenkins, 5 Jones (N. C.) 430. And see People v. Parker, 4 Johns. (N. Y.) 424; State v. Sampson, 125 S. C. 567, 32 Am. Rep. 513.

In Curkendall v People, 36 Mich. 309, it was held that a barn situated fifteen rods from the dwelling house, with a public highway between them, was not within the curtilage.

And in Rex v. Westwood, supra, it was held that buildings separated from the dwelling house by a public road, however narrow, could not be regarded as a part of the dwelling house, so as to be the subject of burglary, where there was no common fence or roof to connect them, though some of the offices necessary to the dwelling house adjoined thereto, and though there was an awning extending therefrom to the dwelling house.

[12] Rex v. Gibson, 1 Leach, C. C. 357, 2 East, P. C. 508; Rex v. Hancock, Russ. & R. 170; Rex v. Chalking, Russ. & R. 334; Rex v. Lithgo, Russ. & R. 357; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789; Mitchell v. Com., 88 Ky. 349. Compare Reg. v. Higgs, 2 Car. & K. 322.

A cellar under a dwelling house is a part of the dwelling house for the purpose of burglary, though it is entered from the outside only, and has no internal communication with the rest of the house. Mitchell v. Com., supra.

The reason why it is held to be burglary to break and enter buildings adjoining and used in connection with the dwelling proper is "the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation," and this must be taken into consideration in determining what is a part of the dwelling house for the purpose of burglary.[13]

(*c*) *Shops, Stores, etc.*—A shop, store, factory or other business building, not being within the curtilage of a dwelling house, is certainly not the subject of burglary at common law, if no person sleeps in it.[14] But it is a dwelling house, or part of a dwelling house, within the definition of burglary, if habitually used in part as a place in which to sleep, either by the proprietor or by his servants, or if it is in a building another part of which is used by the proprietor as his

[13] See Quinn v. People, 71 N. Y. 561, Beale's Cas. 789; State v. Brooks, 4 Conn. 446.

[14] Rex v. Martin, Russ. & R. 108; Rex v. Eggington, 2 East, P. C. 494, 2 Leach, C. C. 913; State v. Jenkins, 5 Jones (N. C.) 430; Hollister v. Com., 60 Pa. St. 103; People v. Parker, 4 Johns. (N. Y.) 424.

dwelling. And it makes no difference that the building is used principally for other purposes, or that the occupant does not take his meals there. The test is whether it is habitually used as a place to sleep.[15] The rule, according to the better opinion, is the same, if a clerk or servant sleeps in a store

[15] Rex v. Stock, Russ. & R. 185, 2 Leach, C. C. 1015, 7 Taunt. 339; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; Moore v. People, 47 Mich. 639; People v. Griffin, 77 Mich. 585; People v. Dupree, 98 Mich. 26; State v. Williams, 90 N. C. 724, 47 Am. Rep. 541; People v. Snyder, 2 Park. Cr. R. (N. Y.) 23; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789.

A shop or store in a dwelling house is a part of the dwelling house for the purpose of burglary. People v. Snyder, supra; Quinn v. People, supra.

In People v. Dupree, supra, where the front room of the building was occupied by the owner as a shoe shop, and was connected with the rear and overhead portion, which was used as a dwelling, the whole building was held a dwelling house, so as to make a breaking and entering of the shop burglary.

In Ex parte Vincent, supra, the building was a two-story house. The front room of the first floor was used as a store, and the back room as a sleeping apartment by the proprietor. The rooms on the second floor were used by the clerks as sleeping apartments, but they neither took their meals nor had their washing done

merely for the purpose of watching and protecting the property, provided it is his regular sleeping place.[16] But occasionally sleep-

there. It was held that the building was a dwelling house.

Where one or more of the rooms of a building are used for business purposes, and another or others under the same roof, and within the same four outer walls, as the dwelling of the proprietor, there need be no internal communication between them to render the former a part of the dwelling, for the purpose of burglary. Quinn v. People, supra. See, also, Rex v. Burrowes, 1 Mood. C. C. 274.

Compare State v. Clark, 89 Mo. 423, where it was held that a basement or cellar, with only an outside door, used for the storage of ice and beer, and having rooms above it occupied by families as a residence, with no internal communication between it and the rooms above, and in which the families had no interest, and over which they had no control, was not a dwelling house.

[16] Rex v. Gibbons, Russ. & R. 422; U. S. v. Johnson, 2 Cranch, C. C. (U. S.) 21, Fed. Cas. No. 15,485; State v. Outlaw, 72 N. C. 598; State v. Williams, 90 N. C. 724, 47 Am. Rep. 541. Compare, contra, Rex v. Davies, 2 Leach, C. C. 876, Beale's Cas. 785; Rex v. Flannagan, Russ. & R. 187.

In State v. Potts, 75 N. C. 129, it was held, Judge Rodman delivering the opinion, that the person sleeping in the store to watch and protect

ing in a store does not give it the character of a dwelling house or make it the subject of burglary.[17]

402. Occupancy of the Premises.

(*a*) *In General.*—To be the subject of burglary at common law, the house must be occupied as a dwelling. It is not enough that it is suitable for a dwelling, and that it is intended to occupy it, even in the near future.[18] It is not necessary, however, if the

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the property must be either the owner, or a member of his family, or his servant, and that the store is not a dwelling house, so as to be the subject of burglary, if the person sleeping there is employed to sleep there solely as a watchman. This decision, however, though supported by some of the early English cases, is contrary to the weight of authority. In the later case of State v. Williams, supra, Judge Ashe said that Judge Rodman drew "a nice and subtle distinction," and expressed doubt as to its soundness.

[17] State v. Jenkins, 5 Jones (N. C.) 430; Rex v. Davies, 2 Leach, C. C. 876, Beale's Cas. 785.

[18] Rex v. Lyons, 2 East, P. C. 497, 1 Leach, C. C. 185, Beale's Cas. 784; Rex v. Martin, Russ. & R. 108; Rex v. Thompson, 2 Leach, C. C. 771, 2 East, P. C. 498; Fuller v. State, 48 Ala. 273; Scott v. State, 62 Miss. 781. Compare, as erroneous, Com. v. Brown, 3 Rawle (Pa.) 207.

Where neither the owner of a house nor any of his family or servants have ever slept in the

house is occupied, that any person shall be actually in it at the time of the breaking and entry.[19] If the occupant of a house locks it up and leaves it, without intending to return, it ceases to have the character of a dwelling house, though the furniture, plate, and other household goods may be left in it.[20] But if he leaves temporarily, with the intention of returning, though he may remain away for some time, the house remains a dwelling house, and a breaking and entry in his absence, with a felonious intent, is burglary.[21] Whether or not there is the *animus revertendi* is the test.[22]

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house, it is not his dwelling house, so as to be the subject of burglary, though he has used it for his meals, and all the purposes of his business. Rex v. Martin, supra.

[19] Anon., Moore, 660, pl. 903, Beale's Cas. 782; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109; Com. v. Brown, 3 Rawle (Pa.) 207; State v. Williams, 40 W. Va. 268.

[20] Rex v. Flannagan, Russ. & R. 187; State v. Meerchouse, 34 Mo. 344, 86 Am. Dec. 109.

[21] 1 Hale, P. C. 556; 1 Hawk. P. C. c. 38, § 18; Schwabacher v. People, 165 Ill. 618; State v. Meerchouse, supra; Com. v. Brown, 3 Rawle (Pa.) 207.

[22] State v. Meerchouse, supra; Schwabacher v. People, supra.

(*b*) *Apartment Houses, Hotels, etc.*—It may be burglary for a person to break and enter, with felonious intent, apartments or rooms in a building in which he himself dwells in another apartment or room. A flat or tenement in an apartment or tenement house is the separate dwelling of the occupant, as far as the occupants of the other apartments or tenements are concerned, and, if one of them breaks and enters the apartment or tenement of another with felonious intent, he is guilty of burglary.[23] For the same reason it is burglary for a guest or lodger in a hotel or lodging house to break and enter the room of another guest or lodger, with felonious intent.[24]

403. Ownership of Premises.

The house must be the house of another;[25] but, as burglary is an offense against the security of the habitation, and not against

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[23] People v. Bush, 3 Park. Cr. R. (N. Y.) 552; Mason v. People, 26 N. Y. 200, Beale's Cas. 788.

[24] State v. Clark, 42 Vt. 629; Colbert v. State, 91 Ga. 705.

So it was decided in England with respect to chambers in a college or inn of court. 1 Hale, P. C. 556.

[25] Clarke v. Com., 25 Grat. (Va.) 908.

the property, occupation, not ownership, is the test.[26] The owner of a house, occupied by a lessee as a dwelling, would be guilty of burglary in breaking and entering the same with felonious intent.[27] Since a guest at a hotel or lodging house has a special right of occupancy of his room, it would seem that the landlord may be guilty of burglary in breaking and entering the same, but this is not the case under all circumstances. If

[26] See Rex v. Jarvis, 1 Mood. C. C. 7; Rex v. Jobling, Russ. & R. 525; White v. State, 49 Ala. 344; Smith v. People, 115 Ill. 17.

Though it is impossible for persons to occupy a house as a dwelling as partners, it is held that a building occupied by a firm in their business, and also by one of the partners as his dwelling, may be described in an indictment for burglary as the "dwelling house" of the firm. Quinn v. People, 71 N. Y. 561, Beale's Cas. 789; Rex v. Athea, Mood. C. C. 329; Rex v. Stock, Russ. & R. 185, 2 Leach, C. C. 1015, 2 Taunt. 339.

And a building owned by a corporation, and lived in by its servant, may be described as the house of the corporation, "for, though an aggregate corporate body cannot be said to inhabit anywhere, yet they may have a mansion house for the habitation of their servants." Hawkins' Case, 2 East. P. C. 501; Picket's Case, Id.

[27] See Rex v. Jarvis, supra; Rex v. Jobling, supra; Smith v. People, supra.

a guest is merely a transient, an indictment for breaking and entering his room must describe the premises as the dwelling house of the landlord;[28] and in such a case, therefore, a breaking and entry by the landlord would not be burglary. It is otherwise, however, if the guest or lodger has permanent apartments.[29]

404. The Breaking.

(*a*) *Necessity for a Breaking.*—Burglary cannot be committed without a breaking, actual or constructive.[30] It is not burglary, therefore, in the absence of fraud, intimidation, or conspiracy with a person in the house, as a servant,[31] to enter, without breaking, through an aperture left in the walls or roof of a house, or through a door or window that is already open. And it can make no

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[28] 1 Hale, P. C. 557; 1 Hawk. P. C. c. 38, § 13; Prosser's Case, 2 East, P. C. 502.

[29] 1 Hale, P. C. 556; 1 Hawk. P. C. c. 38, § 13; People v. St. Clair, 38 Cal. 137. And see Rex v. Carrell, 1 Leach, C. C. 237, 2 East, P. C. 506.

[30] 1 Hale, P. C. 551, 552; 1 Hawk. P. C. c. 38, §§ 3, 4; Clarke v. Com., 25 Grat. (Va.) 908; Brown v. State, 55 Ala. 123; White v. State, 51 Ga. 285; and cases cited in the notes following.

[31] Post, § 404d.

difference, in the latter case, that the door or window is only partly open, however slightly, and has to be pushed further open in order to enter.[32] It was said in a North Carolina case: "Passing an imaginary line is a 'breaking of the close,' and will sustain an action of trespass *quare clausum fregit.* In burglary more is required,—there must be a breaking, removing or putting aside of something material which constitutes a part of the dwelling house, and is relied on as a security against intrusion. * * * Leaving a door or window open shows such negligence as to forfeit all claim to the peculiar protection extended to dwelling houses." [33]

Some Part of the House must be Broken.—Not only must there be a break-

[32] 1 Hawk. P. C. c. 38, § 4; Rex v. Hyams, 7 Car. & P. 441; Reg. v. Davis, 6 Cox, C. C. 369; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; Com. v. Steward, 7 Dane's Abr. 136, Beale's Cas. 786; Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 556; State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555; McGrath v. State, 25 Neb. 780; White v. State, 51 Ga. 285.

Thus, it has been held not to be burglary to enter, without any breaking, through an aperture left in a cellar window to admit light, Rex v. Lewis, 2 Car. & P. 628; or through an open tran-

ing, but it must be of some part of the house itself. It is not burglary to break through an outside gate or fence which forms no part of the house, and then enter the house through an open door or window.[34] Nor is it burglary to enter a house without breaking, and then break something in the house which forms no part of it, as a trunk, or a chest, or a cupboard; and it can make no difference, in such a case, that the chest or cupboard is fixed in the wall.[35]

(*b*) *Technical Meaning of Breaking — Slightest Breaking Sufficient.*—The word "breaking" in the definition of burglary is used in a technical, rather than its popular

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som, McGrath v. State, supra; or through a hole in the roof left for the purpose of light, Rex v. Spriggs, 1 Mood. & R. 357.

[33] State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555.

[34] Rex v. Bennett, Russ. & R. 289; Rex v. Davis, Russ. & R. 322.

In Rex v. Paine, 7 Car. & P. 135, it was held that a shutter box which partly projected from a house, and adjoined the side of a shop window, was not a part of the house, and that a breaking and entering of the same was not burglary.

[35] 1 Hale, P. C. 554; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216.

sense. Any removing or putting aside of something material which constitutes a part of the house, and which is relied upon as security against intrusion, is sufficient.[36] Thus, there is a sufficient breaking if glass is broken or pushed out of a window or door in order to effect an entrance, though it may have been cracked, cut, or even broken to some extent before.[37] And it is sufficient if a house is burned in order to enter;[38] if a latch is lifted, or knob turned, or even if a door, window, transom, or trapdoor, which is entirely closed, is pushed open, though it may not be locked or latched, but may be held in place by a wedge or by its weight

[36] See Com. v. Stephenson, 8 Pick. (Mass.) 354, Beale's Cas. 787.

[37] In Reg. v. Bird, 9 Car. & P. 44, 38 E. C. L. 38, it was held a sufficient breaking to push in the glass of a window which had been cut, where every part of the glass remained in its place until pushed in. See, also, Rex v. Smith, Russ. & R. 417; Rex v. Robinson, 1 Mood. C. C. 327.

[38] White v. State, 49 Ala. 344, where it is held that "a breaking may be done by fire as well as by other means, and the breaking is not lost or merged in the consumption" of the house by the fire.

only;[39] if a netting is removed from an otherwise open window;[40] or if a hole is

[39] 1 Hale, P. C. 552; Rex v. Haines, Russ. & R. 451; Rex v. Hall, Russ. & R. 355; Finch v. Com., 14 Grat. (Va.) 643; Com. v. Steward, 7 Dane's Abr. (Mass.) 136, Beale's Cas. 786; State v. Reid, 20 Iowa, 413; People v. Bush, 3 Park. Cr. R. (N. Y.) 552; State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555; State v. Fleming, 107 N. C. 905; Dennis v. People, 27 Mich. 151; Frank v. State, 39 Miss. 705. And see Lyons v. People, 68 Ill. 271; People v. Dupree, 98 Mich. 26.

In Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376, this was held to be a "breaking," within the Ohio statute requiring a "forcible" breaking.

In the Virginia case, Finch v. Com., supra, it was held a sufficient breaking where an entry was made through a door which was so closed that it came within the casing, and to open which some degree of force was necessary.

Pushing open a closed screen door is a breaking, though the permanent door is open. State v. Conners, 95 Iowa, 485.

That it is a sufficient breaking to push open a closed transom, trapdoor, or similar contrivance, though unfastened, and held in its place by its weight only, see Rex v. Brown, 2 East, P. C. 487, 2 Leach, C. C. 1016, note; Rex v. Russell, 1 Mood. C. C. 377; Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; Dennis v. People, 27 Mich. 151; Nash v. State, 20 Tex. App. 384, 54 Am. Rep. 529. Compare Rex v. Lawrence, 4 Car. & P. 231.

[40] Com. v. Stephenson, 8 Pick. (Mass.) 354, Beale's Cas. 787.

dug under a building, made of logs resting on the ground, and without a floor other than the ground.[41] In all of these cases there is a removing or putting aside of some part of the house intended as security against intrusion, and that is sufficient.

(*c*) *Breaking Inner Doors.*—The breaking need not be of an outer door or window. If a man enters a house without breaking, and when in the house unlocks or opens a closed inner door with felonious intent, and enters, he is just as guilty as if he had broken an outer door.[42] A servant, though lawfully in a

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[41] Pressley v. State, 111 Ala. 34.

[42] 1 Hale, P. C. 553; 1 Hawk. P. C. c. 38, § 4; Rex v. Johnson, 2 East, P. C. 488, Beale's Cas. 785; Rolland v. Com., 85 Pa. St. 66; State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216; People v. Young, 65 Cal. 225; State v. Scripture, 42 N. H. 485; Martin v. State, 1 Tex. App. 525.

In such a case he is guilty of breaking and entering the house with felonious intent. State v. Scripture, supra; People v. Young, supra.

It matters not whether he intends to commit the felony in the particular room into which this inner door opens, or in some other part of the house. Rolland v. Com., supra.

As both a breaking and entry are necessary, an entry without a breaking of an outer door,

house, is guilty of burglary if, with intent to commit a felony, he breaks and enters the chamber of his master or mistress, or any other room into which he has no right to enter.[43] And, as we have seen, a guest or lodger in a hotel or lodging house, or occupant of a flat in an apartment house, may be guilty of burglary in breaking and entering the room or flat of another guest, lodger, or tenant.[44]

(*d*) *Constructive Breaking*—(*1*) *In General.*—There need not necessarily be an actual breaking in all cases to constitute larceny. There are circumstances under which the law regards an entry as a constructive

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and a breaking without an entry of an inner door, has been held insufficient. Reg. v. Davis, 6 Cox, C. C. 369.

[43] 1 Hale, P. C. 553, 554; Rex v. Gray, 1 Strange, 481, Beale's Cas. 784; Edmond's Case, Hutton's Rep. 20, cited 63 Ala. 145, 35 Am. Rep. 10; Colbert v. State, 91 Ga. 705; Hild v. State, 67 Ala. 39.

It is burglary for a servant, left in charge of a house, to break and enter, with felonious intent, a closed room, into which he has no right to go by virtue of his employment. Hild v. State, supra.

[44] Ante, § 402b. As to breaking and entering by the landlord of a hotel into the room of a guest, see ante, § 211.

breaking, when there is no breaking at all in the popular sense of the word.[45]

(2) *Entry by Artifice or Fraud.*—If a person gets into a house by some trick or fraud, with intent to commit a felony therein, there is constructive breaking, and he is guilty of burglary.[46] Thus, there is a constructive breaking if a person effects an entrance by concealing himself in a box;[47] or by pretended hue and cry, or abuse of legal process, for the purpose of gaining admission.[48] The same is true where a person, by some artifice or fraud, as upon a false pretense of business or social intercourse, procures the door of a house to be opened by the occupant or a member of the family, for the purpose of entering and committing a felony. If he enters with such intent immediately after the door is opened, or so

[45] 1 Hawk. P. C. c. 38, § 5; 2 Russ. Crimes (9th Ed.) 1 et seq. And see Clarke v. Com., 25 Grat. (Va.) 908; State v. Henry, 9 Ired. (N. C.) 463.

[46] Le Mott's Case, J. Kelyng, 42, Beale's Cas. 783.

[47] Le Mott's Case, supra; Nicholls v. State, 68 Wis. 416.

[48] 1 Hale, P. C. 552, 553; 1 Hawk. P. C. c. 38, § 5; Farr's Case, 2 Leach, C. C. 1064, note.

soon afterwards as not to allow a reasonable time for shutting it again, there is a constructive breaking, and the offense is burglary.[49] It is necessary, however, that the entry be made immediately or soon after the door is opened. If it is left open, and the entry is not made until a reasonable time for shutting it has elapsed, the doctrine of constructive breaking does not apply, and the entry is not burglary.[50]

(*3*) *Entry by Intimidation.*—In many cases intimidation is equivalent to actual

[49] Johnson v. Com., 85 Pa. St. 54, 27 Am. Rep. 622; State v. Johnson, Phil. (N. C.) 186, 93 Am. Dec. 587; State v. Mordecai, 68 N. C. 207; Clarke v. Com., 25 Grat. (Va.) 908; State v. Carter, 1 Houst. C. C. (Del.) 402. And see Ducher v. State, 18 Ohio, 308.

If a person gains admittance on a false pretense, with felonious intent, and then opens the door and admits an accomplice, both are guilty of burglary. Com. v. Lowrey, 158 Mass. 18.

[50] State v. Henry, 9 Ired. (N. C.) 463. In this case the occupant of a house was decoyed to a distance therefrom, leaving the door unfastened, and his family neglected to fasten it after his departure. Fifteen minutes after his departure, the party entered through the open door. It was held that, because of the delay, there was no burglary.

force. It is so in burglary. Where, in consequence of violence commenced or threatened by a man in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the man then enters with felonious intent, there is a constructive breaking, and he is guilty of burglary.[51] To obtain entrance in this way by threatening to set fire to the house would be burglary.

(*4*) *Opening of Door by Servant or Other Inmate.*—Another case of constructive breaking is where a servant in a house, or other inmate, opens a door and lets in a confederate for the purpose of committing a felony. In such a case both are guilty of burglary.[52] If the servant has no criminal intent, but opens the door merely for the purpose of entrapping one whom he suspects of an intent to commit burglary, neither is guilty.[53]

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[51] 2 Russ. Crimes, 8; 1 Hale, P. C. 553; Rex v. Swallow, 2 Russ. Crimes, 8; Clarke v. Com., 25 Grat. (Va.) 908.

[52] 1 Hale, P. C. 553; 1 Hawk. P. C. c. 38, § 14; Cornwall's Case, 2 Strange, 881; Clarke v. Com., 25 Grat. (Va.) 908; State v. Rowe, 98 N. C. 629.

[53] See post, § 404 g.

(5) *Entry through Chimney.*—It is also a constructive breaking to enter through a chimney, the reason being that a chimney is as much shut as the nature of the thing will admit. It is burglary, therefore, where an entry is effected, with felonious intent, by coming down a chimney, and it is immaterial whether the burglar succeeds in getting into any of the rooms or not.[54]

(e) *Entry without Breaking and Breaking Out.*—In England, prior to the statute of 12 Anne, c. 1, § 7 (the date of which was 1713), there was a difference of opinion whether it was burglary to enter a house without breaking, and then break out in order to escape. Lord Bacon and some others maintained that it was, but the contrary was asserted by Sir Matthew Hale, Lord Holt,

[54] 1 Hale, P. C. 552; 1 Hawk. P. C. c. 38, § 4; Rex v. Brice, Russ. & R. 450; State v. Willis, 7 Jones (N. C.) 190; Donohoo v. State, 36 Ala. 281; Olds v. State, 97 Ala. 81.

In State v. Willis, supra, it was held in effect that it makes no difference how low the chimney is; and a conviction of burglary was sustained where the entry was into a log cabin through a chimney which was made of logs and sticks, and which was partly in decay, and not more than five and a half feet high. Pierson, C. J., dissented.

and others.[55] Most of the courts in this country in which the question has arisen have taken the latter view, and have held that this is not burglary at common law.[56] This is clearly the correct view, for the breaking is with intent to escape, and not with intent to commit a felony, as the definition of burglary at common law requires.

Statutes.—The difference of opinion was settled in England by the statute of Anne, above referred to, which made it burglary for a person to enter without breaking, with intent to commit a felony, or, being in the house, to commit any felony, and then in the nighttime break out of the house. This statute is not in force in this country,[57] but in some states similar statutes have been enacted.[58]

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[55] See 1 Hale, P. C. 553, 554; 4 Bl. Comm. 227; Clarke's Case, 2 East, P. C. 490.

[56] Rolland v. Com., 82 Pa. St. 306, 22 Am. Rep. 758; Brown v. State, 55 Ala. 123; Adkinson v. State, 5 Baxt. (Tenn.) 569. And see White v. State, 51 Ga. 285; State v. McPherson, 70 N. C. 239; Wine v. State, 25 Ohio St. 69.

State v. Ward, 43 Conn. 489, and State v. Bee, 29 S. C. 81, are to the contrary.

[57] Rolland v. Com., supra; Brown v. State, su-

(*f*) *Entry by One Having a Right to Enter.*—If a person has a right to enter a house or room, his opening a door and entering cannot constitute a breaking, so as to

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pra. A contrary opinion was expressed in State v. Ward, supra.

[58] See Pen. Code N. Y. § 498.

In Rex v. Wheeldon, 8 Car. & P. 747, it was held that, if a person commits a felony in a house and breaks out in the nighttime, it is burglary, within the statute, though he may have been lawfully in the house as a lodger.

It was also held in this case that lifting a latch to get out of the house with the stolen property is a sufficient breaking out.

See, also, as to the sufficiency of the breaking out, Rex v. Callan, Russ. & R. 157; Rex v. Brown, 2 Leach, C. C. 1016, note, 2 East, P. C. 487; Rex v. Lawrence, 4 Car. & P. 231; Rex v. Compton, 7 Car. & P. 139.

Entry, without breaking, with intent to commit a felony, and breaking out to escape, was held not to be within a statute providing that any person who, after having entered premises with intent to commit a felony, "shall break such premises," shall be punished in the same way as if he had broken into the premises in the first instance, as the statute contemplates a breaking after entry, when the breaking is for the purpose of committing a felony, and not when it is for the purpose of escape only. Adkinson v. State, 5 Baxt. (Tenn.) 569.

render him guilty of a burglary, whatever may be his intent in entering. For example, a person who occupies a room jointly with another cannot commit burglary in opening the door and entering, even though he may do so with intent to steal the other's property.[59] The same is true where a guest who is lawfully in an inn enters the barroom with intent to steal, for he has a right, as a guest, to enter any of the public rooms.[60]

A servant is not guilty of burglary in entering a house or room which he has a right to enter by virtue of his employment, though he may enter with intent to commit a felony.[61] It is otherwise, however, if he has no right to enter the particular place,[62] or at the particular time.[63]

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[59] Clarke v. Com., 25 Grat. (Va.) 908.

[60] State v. Moore, 12 N. H. 42.

[61] See Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9.

[62] Thus, in Hild v. State, 67 Ala. 39, it was held to be burglary for an employe, who was left in charge of a house, to break and enter a room which he had no right to enter by virtue of his employment.

[63] Thus, in Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9, it was held that a servant or office boy of an attorney, intrusted with the key to the of-

(*g*) *Occupant's Consent to the Entry.*— There can be no breaking, so as to constitute burglary, if the occupant of a house consents to the entry.[64] For this reason there is no breaking, and therefore no burglary, where the occupant, or his servant by his direction or authority, or acting by direction of the police, opens the door for the purpose of entrapping one whom he suspects of an intention to commit a burglary.[65] Merely to lie in wait is not consent.[66] And as we have seen, there is a breaking,—that is, a constructive breaking,—where the occupant is induced to open the door by trick or fraud, or by threat of violence, and where the door is opened by a servant, and a confederate admitted.[67]

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fice, adjoining which the attorney slept, was guilty of burglary in opening the door at night, and entering, with felonious intent, if he did not sleep there, and was not called there at night by his duties; but that he was not guilty if he habitually slept there.

[64] See Turner v. State, 24 Tex. App. 12.

[65] Rex v. Johnson, Car. & M. 218; Rex v. Eggington, 2 Leach, C. C. 913, 2 East, P. C. 666, Beale's Cas. 154; Reg. v. Jones, Car. & M. 611; Allen v. State, 40 Ala. 334, 91 Am. Dec. 476.

[66] Thompson v. State, 18 Ind. 386; State v. Sneff, 22 Neb. 481.

[67] Ante, § 404d (4).

405. The Entry.

(*a*) *Necessity for Entry.*—To constitute burglary it is essential that there shall be an entry as well as a breaking. To break open a door or window with intent to enter and commit a felony is not burglary, if no entry is in fact made, but is merely an attempt to commit burglary.[68]

(*b*) *Sufficiency of Entry.*—The slightest entry, however, is sufficient, if it be with felonious intent. It need not be of the whole body, but may be of the hand, or foot, or head, or even a finger only.[69] Indeed, it need not

[68] 1 Hale, P. C. 555; 1 Hawk. P. C. c. 38, § 3; Rex v. Rust, 1 Mood. C. C. 183; State v. McCall, 4 Ala. 643, 39 Am. Dec. 314; Anon., 1 Dyer, 99a, pl 58, Beale's Cas. 781; Reg. v. Meal, 3 Cox, C. C. 70; Rex v. Fidler, Beale's Cas. 783, is therefore an erroneous decision.

[69] 1 Hale, P. C. 555; 1 Hawk. P. C. c. 38, § 7; Resolution of Judges, And. 114, Beale's Cas. 782; Rex v. Davis, Russ. & R. 499; Rex v. Perkes, 1 Car. & P. 300; Gibbon's Case, Fost. C. L. 107, 2 East, P. C. 490; Rex v. Bailey, Russ. & R. 341; Com. v. Glover, 111 Mass. 395; Fisher v. State, 43 Ala. 17; Franco v. State, 42 Tex. App. 276; Nash v. State, 20 Tex. App. 384, 54 Am. Rep. 529.

Under the Texas statute declaring the entry into the house of any part of the body sufficient,

be of any part of the body, but an entry may be made by an instrument, where the instrument is inserted for the purpose of committing the felony, as by a gun for the purpose of murder, or a hook for the purpose of stealing, etc.[70] Where the accused broke the outer blinds of a window, and inserted his hands or an instrument for the purpose of breaking the sash, but was detected before he made an entry beyond the sash, it was held that there was not a sufficient entry.[71] On the

which is merely declaratory of the common law, it was held that entrance of the finger after raising a window was sufficient. And the court said that this would be a sufficient entry at common law. Franco v. State, supra.

[70] 1 Hale, P. C. 555; 1 Hawk. P. C. c. 38, § 7; Resolution of Judges, And. 114, Beale's Cas. 782; Walker v. State, 63 Ala. 49, 35 Am. Rep. 1, Beale's Cas. 794.

In Walker v. State, supra, the accused, with intent to steal shelled corn, bored a hole through the floor of a corncrib from the outside, and thus drew the corn into a sack below. It was held that the entry of the auger was sufficient, and that he was guilty of burglary.

To shoot from the outside into a house, without putting the gun into the house, is not burglary. Resolution of Judges, supra. See 1 Hale, P. C. 555.

[71] State v. McCall, 4 Ala. 643, 39 Am. Dec. 314.

other hand, where the accused broke a pane of glass in the sash of a window, and introduced his hand for the purpose of undoing the latch, so as to raise the window, the entry was held sufficient though there were inside shutters, and they were not opened.[72] And pushing up a trapdoor has been held a sufficient entry, though only the hand entered.[73] As was stated in a previous section, there is a sufficient entry to constitute burglary where a man comes partly down a chimney, though he may not be able to get all the way down, and may not succeed in getting into any of the rooms.[74]

And in Rex v. Rust, 1 Mood. C. C. 183, it was held that throwing up a window, and introducing an instrument between the window and an inside shutter, to force open the shutter, was not a sufficient entry, unless the hand, or some part of it, was within the window. See, also, Rex v. Roberts, Car. C L. 293, 2 East. P. C. 487.

[72] Rex v. Bailey, Russ. & R. 341. See, also, Franco v. State, 42 Tex. 276, note 69, supra.

[73] Nash v. State, 20 Tex. App. 384, 54 Am. Rep. 529. These cases were under a Texas statute, but the statute was merely declaratory of the common law. See ante, note 69.

[74] Rex v. Brice, Russ. & R. 450; Donohoo v. State, 36 Ala. 281; Olds v. State, 97 Ala. 81.

406. The Time of Breaking and Entry.

The breaking and the entry, to constitute burglary at common law, must both be in the nighttime, and this must be proved.[75] But it is not necessary that both shall occur on the same night.[76] At common law the nighttime, for the purpose of burglary, does not begin until after, and ceases when, there is daylight enough to discern a man's countenance thereby.[77] In England and in some

[75] "The time must be by night, and not by day, for in the daytime there is no burglary." 4 Bl. Comm. 224; 1 Hale, P. C. 549, 550. And see State v. Bancroft, 10 N. H. 105; People v. Griffin, 19 Cal. 578; State v. Whit, 4 Jones (N. C.) 349; State v. McKnight, 111 N. C. 690; People v. Bielfus, 59 Mich. 576; Adams v. State, 31 Ohio St. 462; Com. v. Weldon, 4 Leigh (Va.) 652.

There is no presumption that breaking and entry were in the nighttime. State v. Whit, supra. But where the circumstances proved are such that it may be fairly inferred that they were in the nighttime, the question is for the jury, and they may so infer. People v. Dupree, 98 Mich. 26; State v. Bancroft, supra.

[76] A breaking on one night, and an entry on the next or a still later night, is sufficient. 1 Hale, P. C. 551; Rex v. Jordan, 7 Car. & P. 432; Rex v. Smith, Russ. & R. 417. See, also, Com. v. Glover, 111 Mass. 395.

[77] 1 Hale, P. C. 550, 551; 1 Hawk. P. C. c. 38,

of our states the nighttime is now expressly defined by statute.[78] In most jurisdictions, breaking and entry in the daytime is made burglary by statute.

407. The Felonious Intent.

(*a*) *In General.*—Another essential element of burglary is a felonious intent. No breaking and entry, however forcible, will

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§ 2; 4 Bl. Comm. 224; People v. Griffin, 19 Cal. 578; State v. Bancroft, 10 N. H. 105; State v. Clark, 42 Vt. 629; State v. Morris, 47 Conn. 179; State v. McKnight, 111 N. C. 690.

Moonlight or lamplight is not equivalent to daylight. "It will not avail the prisoner on a charge of burglary that there was light enough from the moon, street lights, and lights of buildings, aided by newly-fallen snow, to enable one person to discern the features of another. There must have been daylight enough for the purpose." State v. Morris, supra; State v. McKnight, supra. And see 4 Bl. Comm. 224; Thomas v. State, 5 How. (Miss.) 20.

[78] In England it is provided that the nighttime shall be deemed to commence at nine o'clock in the evening, and to conclude at six in the morning. 24 & 25 Vict. c. 96, § 1.

The Texas statute fixes it at from thirty minutes after sunset to thirty minutes before sunrise. See Laws v. State, 26 Tex. App. 643.

In Minnesota it is from sunset to sunrise. Pen. Code, § 387.

amount to burglary at common law, unless there is a specific intent to commit an act that is a felony, as murder, rape, larceny, etc.[79] Thus, it is not burglary if the intent is to *persuade* a woman to submit to sexual intercourse, and not to have intercourse by force, if necessary, for intercourse with the woman's consent is not rape, nor a felony.[80] The same is true where the intent is to merely beat or tar and feather the occupant,[81] or to take property under such circumstances that the taking will not constitute robbery or larceny.[82] And for the same reason a person

[79] 1 Hale, P. C. 559; 1 Hawk. P. C. c. 38, § 18; Dobb's Case, 2 East, P. C. 513, Beale's Cas. 181; Rex v. Knight, 2 East, P. C. 510; State v. Shores, 31 W. Va. 491; Price v. People, 109 Ill. 109; Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; Ashford v. State, 36 Neb. 38.

[80] See Harvey v. State, 53 Ark. 425.

[81] 1 Hawk. P. C. c. 38, § 18. Cutting off a man's ear is not mayhem at common law, and to break and enter a house with intent to do so is not burglary. See Com. v. Newell, 7 Mass. 245, where it was held that a breaking and entry with such an intent was not burglary, though a statute made it mayhem to cut off a man's ear, as the statute did not make it a felony.

[82] Thus, it is not burglary to break and enter with intent to take property that is not

is not guilty if he enters with a burglar merely as a detective for the purpose of fastening the guilt on his associate.[83] The intent may be to commit a statutory felony.[84]

(*b*) *Intent must Accompany Both the Breaking and the Entry.*—Both the breaking

the subject of larceny. State v. Lymus, 26 Ohio St. 400.

The same is true where the intent is to take property, not animo furandi, but under a bona fide claim of right or merely to use and then return it. State v. Shores, 31 W. Va. 491; State v. Ryan, 12 Nev. 401, 28 Am. Rep. 802.

As every larceny was a felony at common law, it was enough at common law, and is still so in some jurisdictions, to show an intent to commit any larceny; but where larceny is divided into grand and petit, and petit larceny is reduced to a misdemeanor (ante, § 336), breaking and entry with intent to commit that crime is not burglary. Harvick v. State, 49 Ark. 514; People v. Murray, 8 Cal. 520; Wood v. State, 18 Fla. 967.

A breaking and entry with intent to commit larceny is none the less burglary because there is not enough in the house to make the taking grand larceny, if the burglar does not know this, for, as we shall see, the intended felony need not be consummated. Harvick v. State, 49 Ark. 514. And see State v. Beal, 37 Ohio St. 108.

[83] Price v. People, 109 Ill. 109. See, also, Rex v. Dannelly, Russ. & R. 310, 2 Marsh. 571.

[84] 1 Hawk. P. C. c. 38, § 19; Dobb's Case, 2 East, P. C. 513, Beale's Cas. 181.

and the entry must be with felonious intent. A breaking with felonious intent, followed by an entry without such an intent, or a breaking without, followed by an entry with, such an intent, is not burglary.[85] If a man breaks the window of a house, or lifts a transom or trapdoor, and his hand or head enters, though the entry may be merely for the purpose of effecting a further entrance, as by undoing a fastening, he is guilty of burglary provided the ultimate object is to commit a felony in the house. In other words, the entry in such a case need not be for the immediate purpose of committing the intended felony.[86] It is otherwise when the entry is by an instrument. As we have already seen, if a man breaks a window and inserts an instru-

[85] State v. Moore, 12 N. H. 42; Colbert v. State, 91 Ga. 705.

To break and enter a house without any felonious intent, and to form and carry out such an intent after the entry, is not burglary. Colbert v. State, supra; State v. Moore, supra.

[86] Rex v. Perkes, 1 Car. & P. 300; Reg. v. O'Brien, 4 Cox, C. C. 398; Com. v. Glover, 111 Mass. 395; Nash v. State, 20 Tex. App. 384, 54 Am. Rep. 529; Franco v. State, 42 Tex. 276. And see the dictum in Walker v. State, 63 Ala. 49, 35 Am. Rep. 1, Beale's Cas. 794.

ment for the purpose of committing a felony, as a gun to commit murder, or a hook to commit larceny, there is a sufficient entry to constitute burglary.[87] If an instrument is inserted, however, not for the purpose of committing the intended felony, but for the purpose of procuring admission to the house, as by undoing a bolt or removing an inner shutter, and no part of the body enters, there is not a sufficient entry.[88]

(*c*) *Intent may be Inferred from the Circumstances.*—The intent must always be proved, so as to show that it was felonious, but it may be inferred from the circum-

[87] Ante, § 405 b.

[88] Rex v. Roberts, Car. Crim. Law, 293, 2 East, P. C. 487; Hughes' Case, 1 Leach, C. C. 406; Walker v. State, 63 Ala. 49, 35 Am. Rep. 1, Beale's Cas. 794. And see Reg. v. O'Brien, 4 Cox, C. C. 398.

Thus, in Hughes' Case, supra, it was held not to be burglary merely to bore a hole for the purpose of opening a bolt, though the auger penetrated to the inside of the door.

In Walker v. State, supra, it was said: "When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consum-

stances.[89] An intent to commit a felony at the time of the breaking and entry may very clearly be inferred from its actual commission after the entry.[90] It may also be inferred from the conduct of the party accused, though no felony is committed, and in such a case the manner in which the entry was effected is of weight. Thus, where a man entered the room of a sleeping girl at night, by raising the window, and laid his hand upon her person, and upon her screaming, left hurriedly through the window, without any explanation, it was held that an intent to commit rape might be inferred.[91] So where a man at midnight broke and entered a house in which there were valuables, and

mate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break, but to effect the only entry contemplated and necessary to the consummation of the criminal intent, the offense is complete."

[89] See People v. Marks, 4 Park. Cr. R. (N. Y.) 153; Franco v. State, 42 Tex. 276; Steadman v. State, 81 Ga. 736; State v. McDaniel, 1 Winst. (N. C.) 249.

[90] State v. Moore, 12 N. H. 42; Com. v. Hope, 22 Pick. (Mass.) 1.

[91] State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555.

no other motive appeared, it was held that an intent to steal might be inferred.[92]

408. Commission of Intended Felony.

The breaking and entry with *intent to commit* a felony makes the crime of burglary, and it is not at all necessary that the intent shall be executed after the entry.[93] It follows that one who breaks and enters a house with felonious intent is none the less guilty of burglary because he abandons such intent after the entry, either from fear or from repentance,[94] or because he is unable to execute it by reason of resistance or other circumstances beyond his control.[95]

409. Statutes Relating to Burglary.

In most jurisdictions, perhaps in all, statutes have been enacted for the purpose of extending the common law. Some of them

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[92] Steadman v. State, 81 Ga. 736. And see People v. Soto, 53 Cal. 415; Alexander v. State, 31 Tex. Cr. R. 359.

[93] 3 Inst. 63; 1 Hale, P. C. 561, 562; Wilson v. State, 24 Conn. 57; Olive v. Com., 5 Bush (Ky.) 376; State v. McDaniel, 1 Winst. (N. C.) 249.

[94] State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555.

[95] As, for example, because of resistance by a woman whom he intends to rape, or because of

have made it burglary to break and enter premises that were not the subject of burglary at common law, as shops, stores, warehouses, etc. At common law, as we have seen the breaking and entry must be in the nighttime. Some of the statutes, however, make it burglary to break and enter in the daytime. The statutes are to be construed in the light of the common law, and, unless a contrary intention appears, the terms used, such as "break," "enter," "dwelling house," etc., are to be taken in the sense in which they are understood at common law.[96] Some statutes dispense altogether with the necessity for a breaking, and make it burglary to enter without breaking, if the entry is with felonious intent.[97] Other statutory charges have been mentioned in previous sections.

Degrees of Burglary.—In a few states, burglary, like homicide, has been divided into

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the absence of property which he intends to steal. State v. McDaniel, 1 Winst. (N. C.) 249; Harvick v. State, 49 Ark. 514; State v. Beal, 37 Ohio St. 108.

[96] Reg. v. Wenmouth, 8 Cox, C. C. 348; Pitcher v. People, 16 Mich. 142; Finch v. Com., 14 Grat. (Va.) 643; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; Nicholls v. State, 68 Wis. 416; Quinn

degrees, according to the character of the premises, the time the offense is committed, or other circumstances.[98]

II. ARSON.

410. Definition and Elements.—Arson is one of the common-law felonies. It is the willful and malicious burning of the dwelling house of another, either by night or by day.[99] To constitute the offense, four things are essential at common law:

1. **The building burned must be a dwelling house, as in burglary. But the term "dwelling house" includes outhouses within the curtilage or common inclosure.**
2. **The house must be that of another. But occupancy, not ownership, is the test.**
3. **There must be an actual burning of some part of the house, and not merely a scorching. But the slightest burning is sufficient.**
4. **The burning must be willful and malicious.**

This definition and analysis is of arson at common law. As we shall presently see, the

v. People, 71 N. Y. 561, Beale's Cas. 789; Sims v. State, 136 Ind 358; Schwabacher v. People, 165 Ill. 618.

[97] See Nicholls v. State, 68 Wis. 416; Rolland v. Com., 85 Pa. St. 66; People v. Barry, 94 Cal. 481.

[98] See Pen. Code N. Y. § 496 et seq.; Pen. Code Minn. § 383 et seq.

[99] 1 Hawk. P. C. c. 18, §§ 1, 2, Beale's Cas. 797; 4 Bl. Comm. 220; Mary v. State, 24 Ark. 44, 81

offense has been extended by statute in most jurisdictions so as to include the burning of other buildings than dwelling houses, as shops, warehouses, unoccupied houses, etc., and also to include, under some circumstances, the burning of one's own house.[100]

411. Character of the Premises.

(*a*) *In General.*—Arson, like burglary, is at common law an offense against the habitation of individuals, and not merely an offense against the property as such. The common-law definition is the willful and malicious burning of the "house" of another, but this means the dwelling house of another. At common law, therefore, it is not arson at all to burn shops, stores, warehouses, and the like, unless they are also occupied in part as a residence, but the premises must be a dwelling house.[101] If a shop or store, however,

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Am. Dec. 60; State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; Shepherd v. People, 19 N. Y. 537.

[100] Post, § 416.

[101] 1 Hawk. P. C. c. 18, § 2. Beale's Cas. 797. And see State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; McLane v. State, 4 Ga. 335; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302; Stallings v. State, 47 Ga. 572; State v. Williams, 90 N. C.

is also occupied as a dwelling, it is within the definition of arson.[102] What has been said, in treating of burglary, as to what constitutes a dwelling house, is equally applicable to arson, for any building that is the subject of burglary at common law is also the subject of arson.[103] That a jail is a dwelling house within the definition of arson has been held in a number of cases.[104]

(*b*) *Outhouses within the Curtilage.*—As in burglary, so in the definition of arson, the "house" or "dwelling house" includes and protects all outhouses, as the barn, stable, kitchen, smokehouse, etc., which are within the curtilage or common inclosure, and which are commonly used in connection with the dwelling proper.[105] But outhouses which are

724, 47 Am. Rep. 541; Com. v. Posey, 4 Call. (Va.) 109, 2 Am. Dec. 560.

[102] McLane v. State, 4 Ga. 335; State v. Williams, 90 N. C. 724, 47 Am. Rep. 541; State v. Outlaw, 72 N. C. 598; State v. Jones, 106 Mo. 302; State v. Kroscher, 24 Wis. 64.

[103] Ante, § 401.

[104] People v. Van Blarcum, 2 Johns. (N. Y.) 105; People v. Cotteral, 18 Johns. (N. Y.) 115; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560.

[105] 1 Hale, P. C. 570; 4 Bl. Comm. 221; Anon., Year Book 11 Hen. VII. 1, Beale's Cas. 597;

not within the curtilage or common inclosure are not the subject of arson at common law.[106] What has been said on this point in treating of burglary is equally applicable here.[107]

412. Occupancy of the Premises.

To constitute a dwelling house, within the definition of arson, the house must not be merely intended for use as a residence and fitted for such use, but it must be occupied as a dwelling, for, as has been stated, the offense is against the security of the habitation, and not against the house, considered merely as property. It is not arson at common law, therefore, to burn a building which is only partly completed, and not yet occupied, or even a building which is completed, and even furnished and suitable for present use as a dwelling, but which is not yet occupied.[108]

People v. Taylor, 2 Mich. 250; Hooker v. Com., 13 Grat. (Va.) 763; Com. v. Barney, 10 Cush. (Mass.) 480; Curkendall v. People, 36 Mich. 309; State v. Warren, 33 Me. 30.

[106] Curkendall v. People, 36 Mich. 309.

[107] Ante, § 401 b.

[108] Elsmore v. Inhabitants, etc., 8 Barn. & C. 461; Reg. v. Allison, 1 Cox, C. C. 24; State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; Com. v. Francis, Thatch. C. C. (Mass.) 240; Dick v. State, 53 Miss. 384; Stallings v. State, 47 Ga. 572.

A dwelling house which is occupied, but from which the occupant is temporarily absent, is the subject of arson.[109] It is otherwise, however, if there is no present intention to return.[110] What has been said on this point in dealing with burglary is equally applicable to arson.[111]

413. Ownership of the Premises.

(*a*) *In General.*—To constitute arson at common law, the house must be the dwelling house of some other person than the offender. One who for any reason sets fire to his own dwelling house is not guilty of this crime.[112] And it makes no difference that the house of

[109] State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; State v. Warren, 33 Me. 30; Johnson v. State, 48 Ga. 116.

[110] Hooker v. Com., 13 Grat. (Va.) 763; State v. Clark, 7 Jones (N. C.) 167.

[111] Ante, § 402.

[112] 4 Bl. Comm. 221; Holme's Case, Cro. Car. 376, W. Jones, 351, Beale's Cas. 797; Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; Rex v. Spalding, 2 East, P. C. 1025, 1 Leach, C. C. 218; Rex v. Proberts, 2 East, P. C. 1030; State v. Hurd, 51 N. H. 176; State v. Haynes, 66 Me. 307, 22 Am. Rep. 569; State v. Keena, 63 Conn. 329; State v. Sarvis (S. C.) 24 S. E. 53; People v. De Winton, 113 Cal. 403; post, § 413 c, note 119, and cases there cited.

another is endangered by the fire, nor even that there is an intent to burn the adjoining house of another, if it is not in fact burned.[113] It is not arson at common law for a man to burn his own house, occupied by him, for the purpose of defrauding an insurance company.[114] On this principle, one who burns the house of another at his request or instigation is not guilty of arson.[115] If a man sets fire to his own house, and burns adjoining houses of others, he is guilty of arson.[116]

(*b*) *Husband and Wife.*—Since, at common law, husband and wife are regarded as one person, the wife cannot be guilty of arson in burning the husband's house; and it can make no difference that she is at the time

[113] 4 Bl. Comm. 221; Holme's Case, Cro. Car. 376, W. Jones, 351, Beale's Cas. 797; Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; People v. De Winton, 113 Cal. 403.

[114] Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; State v. Sarvis (S. C.) 24 S. E. 53; State v. Haynes, 66 Me. 307, 22 Am. Rep. 569.

[115] State v. Haynes, supra; Roberts v. State, 7 Coldw. (Tenn.) 359.

[116] 4 Bl. Comm. 221; Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799; post, § 415.

living apart from him.[117] So, also, a husband is not guilty of arson in burning a dwelling house occupied by himself and his wife, jointly, though it may be her property; and this rule is not affected by the married woman's acts in the different jurisdictions giving the wife the property owned or acquired by her, free from the control of the husband.[118]

(*c*) *Occupancy, not Title, Is the Test.*— Since arson is an offense against the security of the habitation, and not against the house as property, when it is said that the house must be that of another, it is meant that it must be occupied by another. A man does not commit arson by burning a house occupied by himself, though it may be owned by another.[119] On the other hand, the legal owner

[117] March's Case, 1 Mood. C. C. 182.

[118] Snyder v. People, 26 Mich. 106, 12 Am. Rep. 302.

[119] Holme's Case, Cro. Car. 376, W. Jones, 351, Beale's Cas. 797; Breeme's Case, 2 East, P. C. 1026; State v. Keena, 63 Conn. 329; State v. Lyon, 12 Conn. 487; State v. Fish, 27 N. J. Law, 323; Sullivan v. State, 5 Stew. & P. (Ala.) 175; State v. Sandy, 3 Ired. (N. C.) 570; ante, § 413a, note 112, and cases there cited.

It is not arson for a mortgagor of a house to

of a house may be guilty of arson if he burns it while it is occupied by a lessee.[120] If the house is occupied by husband and wife, the law regards the husband as occupant, and the offense is against him, though the property may belong to the wife.[121] A jail, in which the jailer and his family reside, is his dwelling house, and the subject of arson.[122]

414. The Burning.

The burning necessary to constitute arson at common law must be an actual burning of some part of the house. An attempt to burn by actually setting a fire is not enough,

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burn it while in possession. Spalding's Case, 2 East, P. C. 1025, 1 Leach, C. C. 218.

[120] 4 Bl. Comm. 221; State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Erskine v. Com., 8 Grat. (Va.) 624; Sullivan v. State, 5 Stew. & P. (Ala.) 175; Snyder v. People, 26 Mich. 106, 12 Am. Rep. 303.

The interest or title of the occupant is altogether immaterial. People v. Van Blarcum, 2 Johns. (N. Y.) 105.

The offense may be committed against one whose occupancy is wrongful. Rex v. Wallis, 1 Mood. C. C. 344.

[121] Rex v. French, Russ. & R. 491; Rex v. Wilford, Russ. & R. 517.

[122] People v. Van Blarcum, 5 Johns. (N. Y.) 105; Stevens v. Com., 4 Leigh (Va.) 683.

if no part of the house is burned. Neither a blackening of the wood by smoke nor a mere scorching of the wood will suffice, but some part of the fiber of the wood must be consumed.[123] For this reason, the words "*incendit et combussit*" were necessary, in the days of law Latin, in all indictments for arson, and the word "burn" is essential now. It is not necessary that any part of the house shall be wholly consumed, or that the fire shall have any continuance. If there is the slightest burning of any part of the house, the offense is complete, though the fire may be put out, or may go out of itself.[124] There need not even be a blaze, but mere charring is sufficient.[125]

[123] 4 Bl. Comm. 222; Reg. v. Russell, Car. & M. 541; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; Howel v. Com., 5 Grat. (Va.) 664; Cochrane v. State, 6 Md. 404; State v. Hall, 93 N. C. 571; People v. Haggerty, 46 Cal. 354; Woolsey v. State, 30 Tex. App. 346. Compare Com. v. Tucker, 110 Mass. 403, Beale's Cas. 800.

[124] 4 Bl. Comm. 222; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; Com. v. Tucker, 110 Mass. 403, Beale's Cas. 800.

[125] Reg. v. Parker, 9 Car. & P. 45; Reg. v. Russell, Car. & M. 541. And see Graham v. State, 40 Ala. 659; State v. Sandy, 3 Ired. (N. C.) 570;

415. Intent—Malice.

All the definitions of arson at common law require that the burning shall be both willful and malicious;[126] but there has been some difference of opinion as to what is necessary to constitute malice within the meaning of the definitions, and the cases on the subject cannot all be reconciled. It would seem clear that a burning arising from negligence and mischance cannot, under any circumstances, be regarded as willful and malicious, and so it has generally been held.[127] And by the better opinion, where the burning is the result of negligence or mischance, the fact that the accused, when he caused the fire, was engaged in the commission of some other offense, even a felony, cannot render him guilty

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Levy v. People, 80 N. Y. 327; Woolsey v. State, 30 Tex. App. 346; People v. Haggerty, 46 Cal. 354; State v. Denin, 32 Vt. 158; State v. Hall, 93 N. C. 571.

[126] 3 Inst. 66, 67; 4 Bl. Comm. 222; 1 Hale, P. C. 566, 569; Reg. v. Faulkner, 13 Cox, C. C. 550, Ir. 11 C. L. 13, Beale's Cas. 213; Jenkins v. State, 53 Ga. 33. 21 Am. Rep. 255; Heard v. State, 81 Ala. 55; Kellenbeck v. State, 10 Md. 431, 69 Am. Dec. 166; McDonald v. People, 47 Ill. 533.

[127] 4 Bl. Comm. 222; 1 Hale, P. C. 569; Reg. v. Faulkner, supra.

of arson.[128] But, on the principle that a man is presumed to have intended the natural and probable consequences of his voluntary acts, if a man does an unlawful act, the natural tendency of which is to set fire to and burn a house, and such a consequence follows, the burning is to be regarded as intentional and malicious.[129] Thus, if one sets fire to his

[128] In Reg. v. Faulkner, supra, which is a leading case on this point, the defendant was indicted for the malicious burning of a ship,—a statutory arson. It appeared that he was a seaman on board the vessel, and went into the hold for the purpose of stealing rum which was stored there. He tapped a barrel, and the rum caught fire from a lighted match which he held, and the ship was burned. The trial judge instructed the jury to convict on the simple ground that the firing of the ship, though accidental, was caused by an act done in the commission of a felony,—larceny of the rum,—and did not leave to the jury any question as to whether the firing was a natural consequence of his unlawful act, so that he could, for that reason, be presumed to have intended it. The court for crown cases reserved quashed the conviction on the ground that the mere fact that the defendant was engaged in the commission of a felony did not make the unintentional firing of the ship malicious. According to this case, and others to the same effect, to constitute a malicious burning, it must be intentional.

[129] See Reg. v. Faulkner, supra; Reg. v. Lyons, 8 Cox, C. C. 84.

own house, which is not arson nor a crime at common law,[130] and burns an adjoining house of another, the burning of the latter is malicious, and constitutes arson.[131]

In reason and on principle, if a man willfully and intentionally sets fire to and burns a house, without justification or excuse, his act is malicious, and he is none the less guilty of arson because he does not intend to consume the house, but is influenced by other motives. Therefore, it would seem that, if a prisoner sets fire to and burns any part of a jail, he is guilty of arson, though his intention may be, not to consume the jail, but merely to effect an escape.[132]

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[130] Ante, §§ 413 a, 413 c.

[131] Isaac's Case, 2 East, P. C. 1031, Beale's Cas. 799. And see State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464; McDonald v. People, 47 Ill. 533; Lacy v. State, 15 Wis. 13; Early v. Com., 86 Va. 921.

[132] Luke v. State, 49 Ala. 30, 20 Am. Rep. 269; Smith v. State, 23 Tex. App. 357; Willis v. State, 32 Tex. Cr. R. 534.

Some courts have held that such a burning is not "malicious," within the definition of "arson." State v. Mitchell, 5 Ired. (N. C.) 350; People v. Cotteral, 18 Johns. (N. Y.) 115. Some of the de-

416. Statutory Burnings.

By statute in most jurisdictions the offense of arson has been extended so as to include the burning of other buildings than dwelling houses. They make the crime an offense against the property, and not merely against the security of the habitation. Thus, statutes have been enacted in many states declaring it arson to burn a shop, a warehouse, a store, a vessel, etc. These statutes do not change the offense otherwise than as to the character of the premises, unless such an intention on the part of the legislature is clear.

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cisions usually cited as sustaining this view are based upon peculiar statutes, and, if construed with reference to the statutes, will be found not to be authority at common law.

In Jenkins v. State, 53 Ga. 33, 21 Am. Rep. 255, the defendant attempted to burn a hole through the door of a guard house, in which he was a prisoner, for the purpose of escaping, and not with the intention of consuming or generally injuring the building. It was held that he was not guilty, under a statute punishing an attempt "to burn a house." This decision, however, was based on the fact that the statutes (Code Ga. 1882, §§ 4376, 4381) punished the attempt to burn a house only where there was an intent "to consume or generally injure the house," and there was no reference to arson at common law.

They are to be construed in the light of the common law.[133] For example, they do not, unless by express terms, dispense with the necessity for an actual burning of some part of the building.[134] Nor, unless such an intent on the part of the legislature is clear, do they change the common-law rule that the house must be that of another than the accused.[135]

The statutes are not to be construed as dispensing with the necessity for the same willfulness and malice as is required by the common law, unless such an intent is clear.[136] Sometimes the statutes use the term "willfully" only, and do not expressly require that the burning shall be malicious. This term, it has been held, means something less than maliciously, and more than intentionally. It means unlawfully, and to some extent willfully. And under a statute punishing the "willful" burning of a jail, a prisoner was held guilty where he set fire to and partly

[133] See Heard v. State, 81 Ala. 55.

[134] Mary v. State, 24 Ark. 44, 81 Am. Dec. 60.

[135] Spalding's Case, 2 East, P. C. 1025, 1 Leach, C. C. 218; State v. Sarvis (S. C.) 24 S. E. 53; People v. Myers, 20 Cal. 76; People v. DeWinton, 113 Cal. 403; People v. Gates, 15 Wend. (N. Y.) 159.

[136] See Heard v. State, 81 Ala. 55.

burned the floor of the jail for the purpose of escaping, though there was no intention to consume the building, and he kept control of the fire by pouring water on it, so as only to burn a hole in the floor.[137]

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[137] Luke v. State, 49 Ala. 30, 20 Am. Rep. 269.

CHAPTER IX.

OFFENSES OTHER THAN AGAINST THE PERSON, PROPERTY, OR HABITATION OF INDIVIDUALS.

I. OFFENSES AFFECTING THE PUBLIC PEACE.

417. In General.—Any act which in itself constitutes a breach of the public peace, or which has a direct tendency to cause a breach of the public peace, is a misdemeanor at common law.

In a broad sense, all offenses are breaches of the public peace. Unless otherwise provided by statute, every indictment, whether for a common-law or statutory offense, con-

cludes by alleging that the offense was committed "against the peace of the state." We are to treat here, however, of those offenses only, other than felonies and certain misdemeanors, as homicide, assault and battery, etc., heretofore considered, which are punished because they especially affect the public peace. It is for this reason that the law punishes forcible entry and detainer, affrays, unlawful assemblies, routs, riots, disturbance of public assemblies, certain kinds of disorderly houses, libel, and malicious mischief. In addition to these specific offenses, it may be laid down as a general rule that any other act which constitutes a breach of the public peace, or which has a direct tendency to cause a breach of the public peace, is a misdemeanor at common law.[1] Thus, where a man discharged his gun at wild fowl, with knowledge and after warning that the report

[1] 4 Bl. Comm. 142 et seq.; Rex v. Billingham, 2 Car. & P. 234; Henderson v. Com., 8 Grat. (Va.) 708, 56 Am. Dec. 160; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; State v. Benedict, 11 Vt. 236, 34 Am. Dec. 688; State v. Jasper, 4 Dev. (N. C.) 323; State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416; State v. Batchelder, 5 N. H. 549.

would injuriously affect a sick person in the neighborhood, and the report had such effect, it was held that his act was an indictable offense, not only because it was a wanton act of mischief, but also because it was against the public peace and security.[2]

"It is not necessary that there shall be actual force or violence to constitute an indictable offense. Acts injurious to private persons, which tend to excite violent resentment, and thus produce fighting and disturbance of the peace of society, are themselves indictable. To send a challenge to fight a duel is indictable, because it tends directly towards a breach of the peace. Libels fall within the same reason. A libel even of a deceased person is an offense against the public, because it may stir up the passions of the living, and produce acts of revenge." [3]

418. Trespass and Forcible Entry and Detainer.—A trespass upon land is a misdemeanor at common law when committed under such circumstances as to constitute a breach of the peace, but not otherwise. It is also punished by statute.

To merely break and enter the close of an-

[2] Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, Beale's Cas. 119.

[3] Com. v. Taylor, 5 Binn. (Pa.) 277; post, § 428.

other is, in contemplation of law, a trespass committed *vi et armis,*—with force and arms; but unless it is committed under such circumstances as to constitute an *actual* breach of the peace, it is not indictable at common law, but is to be redressed by a civil action only.[4] If, however, it is attended by a breach of the peace, it is a misdemeanor. It is a misdemeanor to enter the dwelling house or yard of another, with offensive weapons, in such a manner as to cause terror and alarm to the inmates of the house.[5] It has also been held that it is a misdemeanor at common law

[4] Rex v. Blake, 3 Burrows, 1731, Beale's Cas. 102; Rex v. Storr, 3 Burrows, 1698; Rex v. Wilson, 8 Term R. 357; Kilpatrick v. People, 5 Denio (N. Y.) 277; Com. v. Edwards, 1 Ashm. (Pa.) 46; State v. Burroughs, 7 N. J. Law, 426; Com. v. Powell, 8 Leigh (Va.) 719; Com. v. Gibney, 2 Allen (Mass.) 150.

[5] Henderson v. Com., 8 Grat. (Va.) 708, 56 Am. Dec. 160. In this case, the indictment, which was sustained, charged that the defendant "did break and enter the close of one E., and at the house of said E. did then and there wickedly, mischievously, and maliciously, and to the terror and dismay of one N., wife of said E., fire a gun in the porch of said house, and then and there did shoot and kill a dog belonging to said house," etc.

to maliciously and secretly break and enter a dwelling house in the nighttime with force and arms, with intent to disturb the peace.[6] On the other hand, it was held in a New York case that an indictment which charged that the accused, "with force and arms, unlawfully, willfully, and maliciously, did break to pieces and destroy" two windows in a dwelling house, did not charge an offense at common law, where it did not appear that the act was done in the nighttime, or secretly, or with actual breach of the peace.[7] And the girdling of fruit trees on another's land, though done maliciously, was held to be a mere civil trespass, and not a crime.[8] The fact that a trespass is committed by a number of persons does not make it indictable, if

[6] Com. v. Taylor, 5 Binn. (Pa.) 277.

In Rex v. Hood, Sayer, 161, the court refused to quash an indictment for disturbing a family by violently knocking at the front door of the house for the space of two hours.

[7] Kilpatrick v. People, 5 Denio (N. Y.) 277.

In State v. Batchelder, 5 N. H. 549, however, it was held an indictable offense to break the windows of a dwelling house with clubs in the nighttime, and thus disturb the peace and quiet of a family living in the house.

[8] Brown's Case, 3 Greenl. (Me.) 177.

there is no riot, or unlawful assembly, or anything of that kind.[9]

Forcible Entry and Detainer.—Forcible entry upon the land of another, or forcible detention after a peaceable entry, was made punishable by early English statutes, and is punished by statute in this country. An indictment for forcible entry or forcible detainer will also lie at common law, provided there is such an actual force, or menace of actual force, as to constitute a breach of the peace, but not otherwise.[10] To merely charge that the entry was made *vi et armis,* or with force and arms, is not enough, as these words do not imply an actual breach of the peace.[11] Nor is it enough to show that the entry was by a number of persons, if no riot, or un-

[9] Rex v. Blake, 3 Burrows, 1731, Beale's Cas. 102.

[10] Rex v. Blake, 3 Burrows, 1731, Beale's Cas. 102; Rex v. Storr, 3 Burrows, 1698; Rex v. Wilson, 8 Term R. 357; Rex v. Bathurst, Sayer, 225; Com. v. Taylor, 5 Binn. (Pa.) 277; State v. Pearson, 2 N. H. 550; Com. v. Dudley, 10 Mass. 403. Compare Harding's Case, 1 Greenl. (Me.) 22.

[11] Rex v. Blake, 3 Burrows, 1731, Beale's Cas. 102.

lawful assembly, or anything of that kind is charged.[12]

419. Affray—(a) Definition.—At common law, an affray is the fighting of two or more persons in a public place, to the terror or alarm of the people.[13] It is a misdemeanor. In some states the statutory definition is slightly different.

(*b*) *The Fighting.*—To constitute this offense at common law, and under the statutes as well, there must be fighting by or between

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[12] Rex v. Blake, 3 Burrows, 1731, Beale's Cas. 102.

In Rex v. Storr, supra, the indictment was for unlawfully entering the prosecutor's yard, and digging the ground and erecting a shed, and unlawfully, and with force and arms, putting out and expelling the prosecutor from the possession, and keeping him out of the possession. This indictment was quashed. Rex v. Blake, supra, was an indictment for breaking and entering, with force and arms, a close (not a dwelling house), and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession. This also was quashed, and the rule laid down by all the court was that there must be force or violence shown upon the face of the indictment, —as some riot or unlawful assembly.

[13] 4 Bl. Comm. 145; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Perry, 5 Jones (N. C.) 9, 69 Am. Dec. 768; McClellan v. State, 53 Ala. 640; State v. Brewer, 33 Ark. 176; Childs v. State, 15 Ark. 204; Com. v. Simmons, 6 J. J. Marsh.

two or more persons.[14] And there must be actual fighting. Mere quarrelsome and threatening words, without more, will not amount to an affray.[15] If a person uses in-

(Ky.) 614; State v. Sumner, 5 Strobh. (S. C.) 53, 56; Wilkes v. Jackson, 2 Hen. & M. (Va.) 355, 360.

An affray is where two or more come together without any premeditated design to disturb the public peace, and break out into a quarrel among themselves, and is distinguishable from a riot, where there is more or less concert of action, mutual co-operating and assisting of each other for a common purpose, whether it be a general disturbance of the peace, or an attack upon individuals, the destruction of property, or any other object which is unlawful, for the accomplishment of which they are unitedly, or in separate parties or bands. People v. Judson, 11 Daly (N. Y.) 1.

An affray involves an assault, but it is distinguishable from an assault in the fact that the fighting must be in a public place. Post, § 419e.

[14] Simpson v. State, 5 Yerg. (Tenn.) 356; People v. Moore, 3 Wheeler, Cr. Cas. (N. Y.) 82; Thompson v. State, 70 Ala. 26. Two persons who fight, not against each other, but against a third person, may be indicted and convicted. Thompson v. State, supra.

[15] Simpson v. State, 5 Yerg. (Tenn.) 356; Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; O'Neill v. State, 16 Ala. 65; Pollock v. State, 32 Tex.

sulting language towards another, and thereby provokes an assault by the other, but does not resist or return the other's blows, this, according to the better opinion, is not an affray.[16] It is otherwise, however, if a person, being willing to fight, uses language intended or calculated to provoke an assault, and engages in a fight when the assault is made.[17] Insulting and threatening words, accompanied by the drawing of weapons by both parties, and attempts to use them, will amount

Cr. R. 29; State v. Sumner, 5 Strobh. (S. C.) 53. In State v. Davis, 65 N. C. 298, the statement that words alone may amount to an affray was mere dictum, and cannot be sustained.

[16] O'Neill v. State, 16 Ala. 65; Pollock v. State, 32 Tex. Cr. R. 29. In North Carolina, contrary to these decisions, this is held to be an affray, where the insulting words are intended or calculated to provoke an assault. State v. Fanning, 94 N. C. 940, 55 Am. Rep. 653; State v. Perry, 5 Jones (N. C.) 9, 69 Am. Dec. 768. And see State v. Davis, 80 N. C. 351, 30 Am. Rep. 86.

[17] State v. Sumner, 5 Strobh. (S. C.) 53; Pollock v. State, 32 Tex. Cr. R. 29; State v. King, 86 N. C. 603. If a person's language or conduct is calculated to provoke an assault, and a fight results, it is no defense against an indictment for an affray to say that he did not intend to bring on a fight. State v. King, supra; State v. Sumner, supra.

to an affray.[18] It has been said that going about in a public place armed with unusual and dangerous weapons, to the terror of the people, is an affray,[19] but the better opinion is to the contrary.[20]

(*c*) *Fighting by Agreement.*—In some states the statutory definition of an affray requires that the fighting shall be by agreement between the parties, and, in such a case, that it was by agreement must be shown.[21] At common law, and under most statutes, agreement or mutual consent is not necessary.[22]

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[18] Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517.

[19] State v. Woody, 2 Jones (N. C.) 335. In the case of State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416, this was held to be an offense at common law,—an offense against the public order and sense of security,—but it was not held to be an affray.

[20] Simpson v. State, 5 Yerg. (Tenn.) 356.

[21] Klum v. State, 1 Blackf. (Ind.) 377; Supreme Council v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298.

[22] Cash v. State, 2 Overt. (Tenn.) 198; Pollock v. State, 32 Tex. Cr. R. 29. And see Supreme Council v. Garrigus, supra.

As was said in Cash v. State, supra, it is because the violence is committed in a public place, and to the terror of the people, that the crime is

(*d*) *Self-Defense.*—If a person, in fighting, is acting purely in self-defense, or in the defense of a child or other person whom he has a right to protect, he is not guilty of an affray.[23] The plea of self-defense will not avail, however, if the accused brought on the fight by insulting and abusive language or conduct,[24] or if he engaged in the fight willingly, and not merely on the defensive.[25]

(*e*) *Public Place.*— Both at common law and under the statutes, the fighting must be in a public place. If it is in private, the offense is merely assault and battery.[26] Thus,

called an "affray," instead of "assault and battery," and not because it took place by the mutual consent of the parties.

There is dictum to the contrary in Duncan v. Com., 6 Dana (Ky.) 295.

[23] People v Moore, 3 Wheeler, Cr. Cas. (N. Y.) 82; State v. Sumner, 5 Strobh. (S. C.) 53. And see State v. Harrell, 107 N. C. 944.

[24] State v. King, 86 N. C. 603; State v. Sumner, 5 Strobh. (S. C.) 53; Pollock v. State, 32 Tex. Cr. R. 29.

[25] State v. Harrell, 107 N. C. 944. And see State v. Downing, 74 N. C. 184.

[26] 4 Bl. Comm. 145; Reg. v. Hunt, 1 Cox, C. C. 177; State v. Weekly, 29 Ind. 206; State v. Sumner, 5 Strobh. (S. C.) 53; McClellan v. State, 53

a fight in a field surrounded by woods, and situated at a distance from any highway or other public place, is not an affray, though there may be another person present besides the combatants.[27] Even a highway is not necessarily a public place, within the definition of an "affray."[28] The fight need not originate in a public place. It is an affray, though commenced in private, if it is carried by flight and pursuit to places where people are assembled.[29]

(*f*) *Terror of the People.*—The definitions of an "affray" make it essential that

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Ala. 640; Thompson v. State, 70 Ala. 26; State v. Brewer, 33 Ark. 176; Childs v. State, 15 Ark. 204; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Heflin, 8 Humph. (Tenn.) 84.

[27] Taylor v. State, 22 Ala. 15. An inclosed lot, situated thirty yards distant from the street of a town, but visible from the street, has been held a public place. Carwile v. State, 35 Ala. 392.

[28] State v. Weekly, 29 Ind. 206. Contra, State v. Warren, 57 Mo. App. 502.

Thus, as was said in the case of State v. Weekly, supra, a fight would not be an affray if it should take place on a part of the highway concealed entirely from public view by a growth of timber.

[29] Wilson v. State, 3 Heisk. (Tenn.) 278; State v. Billings, 72 Mo. 662.

the fighting shall be, not only in a public place, but also to the terror of the people;[30] and a conviction has been set aside because of the court's failure to instruct the jury to this effect.[31] The existence of this element, however, as a matter of fact, need not be proved. If the fighting is shown to have been in a public place, "the inference of law will be strong enough to import whatever terror may be a necessary ingredient."[32]

420. Prize Fighting.—To engage in a prize fight is a misdemeanor at common law, if it takes place under such circumstances as to constitute, or tend to cause, a breach of the public peace.

Prize fighting—fighting for a prize or reward[33]—is expressly punished by statute in many jurisdictions. It is not a distinct offense, *eo nomine,* at common law, but it is a misdemeanor at common law if it takes place in public, so as to constitute an affray or

[30] 4 Bl. Comm. 145; State v. Warren, 57 Mo. App. 502; Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; State v. Sumner, 5 Strobh. (S. C.) 53, 56.

[31] State v. Warren, 57 Mo. App. 502.

[32] State v. Sumner, 5 Strobh. (S. C.) 53, 56. And see Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517.

[33] See Sullivan v. State, 67 Miss. 352.

riot, or to otherwise constitute or tend to cause a breach of the public peace. It is not a lawful game at common law, as is a friendly boxing or wrestling match.[34]

421. Dueling.—It is a misdemeanor at common law to fight a duel, or to send, or to knowingly bear, or to intentionally provoke, a challenge to fight a duel.

In a broad sense, any fighting of two persons, one against the other, by agreement, is a duel, but the term, as commonly used, implies such a fighting with deadly weapons. In some countries it is not unlawful, but it is a misdemeanor at common law in England and in this country.[35] It is also a misdemeanor at common law to give a challenge to fight a duel, either by words or by letter, or to knowingly be the bearer of such a challenge,[36] or to designedly provoke such a chal-

[34] 1 East, P. C. 270; Rex v. Billingham, 2 Car. & P. 234; Rex v. Perkins, 4 Car. & P. 537. State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328. And see Com. v. Wood, 11 Gray (Mass.) 85.

[35] 4 Bl. Comm. 145, 199; Com. v. Lambert, 9 Leigh (Va.) 603.

[36] 4 Bl. Comm. 150; 1 Hawk. P. C. c. 63, § 19; Com. v. Taylor, 5 Binn. (Pa.) 277. See Brown v. Com., 2 Va. Cas. 516.

lenge.[37] To constitute the offense of dueling, it is not necessary that any injury shall be done.[38] These acts are now punished in most jurisdictions by statute.[39]

422. Carrying Weapons.—There is a conflict of authority as to whether it was a misdemeanor at common law to go about armed with dangerous and unusual weapons, to the terror and alarm of the people, but carrying weapons or concealed weapons is very generally prohibited and punished by statute.

At Common Law.— In a well-considered Tennessee case it was held that it was no offense at all at common law for a man to go about in public places armed with dangerous and unusual weapons, where there was no fighting, or attempt to use the weapons, though it was alleged to have been done to the terror of the people.[40] In North Carolina the contrary was held,[41] and this decision

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[37] 2 Whart. Crim. Law, § 177.

[38] See Com. v. Lambert, 9 Leigh (Va.) 603.

[39] See Am. & Eng. Enc. Law (2d Ed.) tit. "Dueling."

[40] Simpson v. State, 5 Yerg. (Tenn.) 356. As to whether it is an affray, see ante, § 419.

[41] State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416. And see State v. Lanier, 71 N. C. 288.

seems to be supported both by general principles and by authority.[42]

Statutory Offense.—Carrying of weapons, except by certain privileged classes, was prohibited and punished by early English statutes. And in this country there are statutes in most states making it a misdemeanor to carry concealed weapons, except in certain cases.[43]

423. Unlawful Assembly.—An unlawful assembly, which is a misdemeanor at common law, is an assembly of three or more persons, either—

1. **With intent to commit a crime by open force,**
2. **Or with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of it.[44]**

To constitute an unlawful assembly, there

[42] The statute of Northampton (2 Edw. III. c. 3), punishing such acts, has been said to have been merely declaratory of the common law. Knight's Case, 3 Mod. 117; State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416. And Hawkins says that this was an offense at common law. 1 Hawk. P. C. c. 28, § 4.

[43] See Am. & Eng. Enc. Law (2d Ed.) tit. "Carrying Weapons."

[44] Steph. Dig. Crim. Law, art. 70. And see 3

must be a meeting of three or more persons—not less than three[45]—for such a purpose as is stated above. If persons who have assembled for a lawful purpose afterwards associate together to do an unlawful act, such association is equivalent to an assembling for that purpose.[46] The purpose of the assembly may be to commit some crime, but this is not necessary. It may be to do any act, lawful or unlawful, provided the purpose is to be carried out in such a manner as to give firm and courageous persons in the neighborhood reasonable grounds to apprehend a breach of the peace.[47] It is essential that the assembly

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Inst. 176; 1 Hawk. P. C. c. 65, § 9; 4 Bl. Comm. 146; Beatty v. Gillbanks, 9 Q. B. Div. 308, 15 Cox, C. C. 138. Beale's Cas. 105; Reg. v. McNaughten, 14 Cox, C. C. 576; State v. Cole, 2 McCord (S. C.) 117; People v. Judson, 11 Daly (N. Y.) 1, 83.

[45] Post, § 425e.

[46] State v. Cole, 2 McCord (S. C.) 117.

[47] Steph. Dig. Crim. Law, art. 70; Reg. v. Neale, 9 Car. & P. 431; Rex v. Brodribb, 6 Car. & P. 571; Reg. v. Vincent, 9 Car. & P. 91.

Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquility and peace of the neighborhood, is an unlawful assembly; and, in viewing this

shall either be for an unlawful object, or shall be tumultuous, and against the peace. For this reason, persons—as members of the Salvation Army, for example—who assemble for a lawful purpose, and without any intention of carrying it out unlawfully, are not guilty of an unlawful assembly merely because they have good reason to believe that their assembly will be opposed, and that those who will oppose it will commit a breach of the peace.[48] There must be no carrying out of the unlawful purpose, nor any movement towards carrying it out, for in such a case the offense becomes a rout or a riot.[49] Both a rout and

question, the jury should take into their consideration the hour at which the parties meet, and the language used by the persons assembled, and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. Reg. v. Vincent, 9 Car. & P. 91.

[48] Beatty v. Gillbanks, 9 Q. B. Div. 308, 15 Cox, C. C. 138, Beale's Cas. 105.

[49] Post, §§ 424, 425. "The difference between a riot and an unlawful assembly is this: If the parties assemble in a tumultuous manner, and

a riot, however, include unlawful assembly, and a man may be convicted of the latter on proof of the former.[50]

Statutes.—In some jurisdictions, the statutory offense of unlawful assembly differs from the offense at common law. In New York, to sustain an indictment for unlawful assembly, it must be proved that three or more persons, being assembled, united in attempting or threatening an act "tending towards a breach of the peace, or an injury to person or property, or any unlawful act." [51] A threat made by one or two persons only, although in an assembly of many persons, is not within the statute.[52] It need not affirmatively appear, however, that other persons present when the threat was made uttered or

actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose, which, if executed, would make them rioters, and, having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly." Per Mr. Justice Patterson in Rex v. Birt, 5 Car. & P. 154.

[50] See State v. Stalcup, 1 Ired. (N. C.) 30.

[51] Pen. Code N. Y. § 451, subd. 3; People v. Most, 128 N. Y. 108, 26 Am. St. Rep. 458 (anarchist case).

[52] People v. Most, supra.

repeated the same words. Participation in the threat may be shown by the adoption by others of the language used, exhibited by their conduct.[53] Threats of personal violence made in New York against persons in another state, and threats relating to acts not presently to be done, but to be performed at some future time, are within the statute.[54]

424. Rout.—A rout is where three or more persons, who have assembled in such a way as to constitute an unlawful assembly, make some advance towards doing an unlawful act. It is a misdemeanor at common law.[55]

As in unlawful assembly, so in a rout, there must be at least three persons.[56] "Rout" differs from "unlawful assembly" in that there is something more than the mere assembling. Where three or more persons, who have assembled for the purpose of doing any unlawful act, make any movement or advance towards doing it, the offense is no longer a mere unlawful assembly, but becomes a rout.

[53] People v. Most, 128 N. Y. 108, 26 Am. St. Rep. 458.

[54] Id.

[55] Steph. Dig. Crim. Law, art. 71; 4 Bl. Comm. 146; 1 Hawk. P. C. c. 65, § 14; State v. Sumner, 2 Speer (S. C.) 599; People v. Judson, 11 Daly (N. Y.) 1, 83.

[56] See post, § 425e.

Thus, if three or more persons come together for the purpose of lynching or tarring and feathering a man, or of committing a trespass on land, and start out towards the place where the unlawful act is to be done, they are guilty of a rout.[57]

425. Riot—(a) In General.—A riot is where three or more persons, who have assembled under such circumstances as to constitute an unlawful assembly, actually engage in carrying out their unlawful purpose, or where three or more persons, who have assembled without any unlawful purpose, form and proceed to carry out such a purpose in a violent or tumultuous manner. It is a misdemeanor at common law.[58]

Riot includes unlawful assembly and rout.[59] There must be at least three persons.[60] When three or more persons, who have assembled for the purpose of doing any unlawful act, whether it be a crime or a mere civil trespass, actually engage in the execution of their unlawful purpose in a violent or

[57] See authorities above cited.

[58] Steph. Dig. Crim. Law, art. 72; 3 Inst. 176; 4 Bl. Comm. 146; 1 Hawk. P. C. c. 65, § 1.

[59] State v. Stalcup, 1 Ired. (N. C.) 30; Dougherty v. People, 5 Ill. 179; Com. v. Gidney, 2 Allen (Mass.) 150.

[60] See post, this section.

tumultuous manner, they are guilty of riot.[61] It is also a riot for three or more persons, who have assembled for a lawful purpose, or who happen to be together without any previous understanding, to determine upon doing an unlawful act in concert, and then engage in the execution of their unlawful purpose in a violent or tumultuous manner.[62] Even a lawful act may be done in such a manner as to render the doers guilty of riot. If three or more persons, acting in concert, engage in doing an act in a violent or tumul-

[61] State v. Cole, 2 McCord (S. C.) 117; State v. Connolly, 3 Rich. (S. C.) 337; State v. Jackson, 1 Speer (S. C.) 13; People v. Judson, 11 Daly (N. Y.) 1, 83.

In Bell v. Mallory, 61 Ill. 167, a man claiming to have purchased a colt procured the assistance of two other persons to drive it from the range into an inclosure of the owner, and then, against the remonstrance of the owner, attempted to secure it and take it away, one of the other men being armed with a pistol, and threatening the owner on his interfering to prevent the taking. This was held to be a riot.

When a number of persons tumultuously endeavor to rescue a prisoner from an officer, there is an act of violence, though no blow is struck. Fisher v. State, 78 Ga. 258.

[62] State v. Cole, 2 McCord (S. C.) 117; State v. Snow, 18 Me. 346.

tuous manner, thereby committing a breach of the peace, they are guilty of riot, whether their object be otherwise lawful or unlawful.[63] That the parties intended merely a frolic or joke is no defense.[64]

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[63] 4 Bl. Comm. 146; 10 Mod. 116; State v. Connolly, 3 Rich. (S. C.) 337; State v. Brazil, Rice (S. C.) 257; Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148. And see Kiphart v. State, 42 Ind. 273; Bankus v. State, 4 Ind. 114.

In State v. Brazil, supra, a band of eight or ten disguised and armed men had paraded the streets of a town at night, marching backward and forward, shooting guns and blowing horns, to the terror and alarm of the people. It was held that they were guilty of riot. It was said by the court in this case: "Even admitting the acts the defendants performed were not in themselves unlawful, yet they were calculated to excite terror and alarm, and in two of the cases were actually proved to have produced that effect."

In Indiana the statute makes it a riot for three or more persons to actually do an unlawful act of violence, either with or without a common cause of quarrel, or even to do a lawful act in a violent and tumultuous manner. See State v. Scaggs, 6 Blackf. (Ind.) 37. To violently and unlawfully burst open the door of another's dwelling-house is within the statute. Id.

[64] State v. Alexander, 7 Rich. (S. C.) 5; State v. Brazil, Rice (S. C.) 257 (as to which case see

(*b*) *Concert of Action.*—To render persons guilty of riot, they must act in concert.[65] But the concert of action may exist in the execution of the act itself. It is not necessary that the parties shall have deliberated or exchanged views with each other before entering upon the execution of their common purpose.[66]

(*c*) *Distinguished from Treason.*— The parties must be engaged in a private purpose, as distinguished from an attempt to over-

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the note preceding); State v. Brown, 69 Ind. 95; Bankus v. State, 4 Ind. 114.

In State v. Alexander, supra, four persons went at midnight, upon concert, to the prosecutor's stable, for the purpose of shaving his horse's tail, and did so, making such a noise and disturbance as to arouse the prosecutor, and alarm the members of his family. It was held that they were guilty of riot.

[65] Sloan v. State, 9 Ind. 565.

If a person, who is at a distance of thirty rods when a riot is committed by others, comes up immediately afterwards, and does violence upon the same person, but not acting in concert with the others, he is not guilty of riot, but of assault and battery. Sloan v. State, supra. It is otherwise if he is acting in concert with the others. Hibbs v. State, 24 Ind. 140.

[66] People v. Judson, 11 Daly (N. Y.) 1, 84.

throw or subvert the government, which is treason.[67]

(*d*) *Breach of Peace and Terror to the People.*—To constitute a riot, the acts done must be against the public peace, or to the terror and alarm of the people.[68] Many of the definitions of a riot expressly require that the acts shall be done to the terror or alarm of the people,—*in terrorem populi.* But if persons assemble to do an unlawful act, the apparent tendency of which is to inspire terror or alarm, and execute their purpose, it is not necessary to show affirmatively that people were in fact terrorized or alarmed.[69] The terror or alarm need not be to more than one person or one household.[70]

(*e*) *Number of Persons.*—Unless the rule is changed by statute, less than three persons cannot be guilty of an unlawful assembly, a rout, or a riot. There may be any number

[67] State v. Cole, 2 McCord (S. C.) 117; People v. Judson, 11 Daly (N. Y.) 1, 83.

[68] State v. Cole, 2 McCord (S. C.) 117; Rex v. Cox, 4 Car. & P. 538.

[69] State v. Alexander, 7 Rich. (S. C.) 5. See Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148.

[70] State v. Alexander, supra.

over two, but there must be at least three.[71] It is not necessary, however, that three persons be indicted or be known. An indictment will lie against one or two persons for either of these offenses, if it be alleged and proved that there were three or more persons, and that the others are dead, or that their names are not known.[72] Where three persons are together for a common unlawful purpose, it is not necessary, in order to make them all guilty of riot, that all should do some physical act. It is enough if two or even one of them does the unlawful act, if the others are present, abetting it.[73]

(*f*) *Justification or Excuse.*—Persons act-

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[71] 4 Bl. Comm. 146; Rex v. Scott, 3 Burrows, 1262; State v. O'Donald, 1 McCord (S. C.) 532. And see Turpin v. State, 4 Blackf. (Ind.) 72; Com. v. Berry, 5 Gray (Mass.) 93.

Under the Illinois statute, two persons may commit these offenses. See Logg v. People, 92 Ill. 598. The same is true under the Georgia statute. Prince v. State, 30 Ga. 27.

[72] Rex v. Scott, 3 Burrows, 1262; State v. Calder, 2 McCord (S. C.) 462; State v. Brazil, Rice (S. C.) 257.

[73] State v. Straw, 33 Me. 554. See, also, Williams v. State, 9 Mo. 270; People v. Judson, 11 Daly (N. Y.) 1, 85.

ing under lawful authority, as peace officers and soldiers, so long as they do not exceed their authority, either as to the thing done, or the manner of doing it, are not guilty of riot. But peace officers and soldiers may be guilty of riot if they act without authority, or in excess of their authority.[74] Custom is no justification or excuse.[75]

(*g*) *Acts of One the Acts of All.*—When three or more persons enter in concert upon the execution of an unlawful purpose, and the combination or concert is shown, the acts of one are the acts of all.[76] To constitute a person a rioter, it is not necessary that he

[74] State v. Cole, 2 McCord (S. C.) 117; Darst v. People, 51 Ill. 286; Douglass v. State, 6 Yerg. (Tenn.) 525.

In Darst v. People, supra, police officers and town trustees who proceeded to a man's house, broke down the door, and seized and carried away intoxicating liquors, without previous judicial determination that the man was guilty of maintaining a nuisance in violation of a statute, were convicted of riot, though the statute in terms authorized this mode of proceeding. It was held that the statute was unconstitutional in so far as it allowed such seizure without previous judicial proceedings, and, in effect, that it was no justification.

[75] Bankus v. State, 4 Ind. 114; ante, § 84.

[76] Bell v. Mallory, 61 Ill. 167; People v. O'Loughlin, 3 Utah, 133.

shall be actively engaged, or that he shall do any physical act of violence himself. It was said in substance in a New York case: The law does not distinguish between the relative degrees of violence on the part of individuals in a riot, but all who aid and assist in it are equally guilty. Any act in aid or furtherance of the common design is sufficient. It is not necessary that a party shall do any physical act, such as throwing a stone, or commit personal violence, or be armed with a weapon, or make use of threatening speeches. If, by any act of his, done with intent to create a riot, he assists to bring it about, or if, by signs, words, gestures, cries, shouting, or any other thing, he aids to promote or augment it, he is guilty.[77]

426. Disturbance of Public Assembly.—Disturbance of any public assembly, whether the assembly be for the purpose of religious worship, or for some other lawful purpose, is a misdemeanor at common law.[78]

The reason why the disturbance of a public

[77] People v. Judson, 11 Daly (N. Y.) 1, 85. And see State v. Straw, 33 Me. 554; Williams v. State, 9 Mo. 270.

[78] Com. v. Hoxey, 16 Mass. 385; State v. Jasper, 4 Dev. (N. C.) 323; State v. Linkhaw, 69 N. C.

assembly is punished as a misdemeanor at common law is because it either amounts to a breach of the peace in itself, or because it has a direct tendency to cause a breach of the peace. The assembly need not be for the purpose of religious worship. It is a misdemeanor to disturb any public assembly.[79] In most states, perhaps in all, such offenses are now expressly punished by statute.[80]

427. Disorderly Houses.—A house which is kept in such a way as to disturb the public peace, or to encourage or promote breaches of the public peace, is a disorderly house, and the keeping of the same is a misdemeanor at common law.

Some disorderly houses are of such a nature that they tend to corrupt the morals of the community, and the keeping of them is punished as a misdemeanor for this reason.[81] Others are of such a nature that they tend to encourage or promote breaches of the peace,

214, 12 Am. Rep. 645; Bell v. Graham, 1 Nott & McC. (S. C.) 278, 9 Am. Dec. 687; Hunt v. State, 3 Tex. App. 116, 30 Am. Rep. 126. See, also, State v. Wright, 41 Ark. 410, 48 Am. Rep. 43; Lancaster v. State, 53 Ala. 398, 25 Am. Rep. 625.

[79] See the cases above cited.

[80] See Am. & Eng. Enc. Law (2d Ed.) tit. "Disturbing Meetings."

[81] Post, §§ 465, 466.

and the keeping of them is punished on this ground. There are others, the keeping of which is punished for both reasons. Of the first kind are bawdy houses. Of the second kind are saloons and other places in which disorderly persons are allowed to congregate, and by quarreling, swearing, or other disorder, disturb the public peace, and annoy the neighborhood. The keeping of such a place is a misdemeanor at common law.[82] Common gambling houses, and places where cock fighting and other unlawful games and sports are permitted, tend, not only to corrupt the public morals, but also to encourage or promote breaches of the peace, and the keeping of such places is a misdemeanor for both reasons.[83]

[82] 1 Hawk. P. C. c. 75, § 6; Rex v. Moore, 3 Barn. & Adol. 184; U. S. v. Dixon, 4 Cranch, C. C. 107, Fed. Cas. No. 14,970; State v. Buckley, 5 Harr. (Del.) 508; State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; State v. Haines, 30 Me. 65; Beard v. State, 71 Md. 275, 17 Am. St. Rep. 536.

[83] 1 Hawk. P. C. c. 75, § 6; Rex v. Higginson, 2 Burrows, 1232; Rex v. Dixon, 10 Mod. 335; U. S. v. Dixon, 4 Cranch, C. C. 107, Fed. Cas. No. 14,970; State v. Haines, 30 Me. 65; Vanderworker v. State, 13 Ark. 700; King v. People, 83 N. Y. 587; Beard v. State, 71 Md. 275, 17 Am. St. Rep. 536; Cahn v. State, 110 Ala. 56; Lord v. State, 16 N. H. 325, 41 Am. Dec. 729; post, § 466.

To render a house disorderly, the disorder need not be inside the house. If a place is so conducted as to attract disorderly persons, the keeping of it is a misdemeanor, although the persons go or remain outside to be disorderly.[84] If a man is guilty of keeping a disorderly house, it is no defense for him to show that he has endeavored to prevent breaches of the peace and other disorder.[85]

428. Libel —(a) In General.—It is a misdemeanor at common law to maliciously publish any writing, picture, sign, or other representation which tends to defame a living person, and expose him to ridicule, hatred, or contempt, or, under some circumstances, to defame the memory of a deceased person. Slander, or verbal defamation, is not punished at common law, but is punished in some jurisdictions by statute.

(*b*) *Against a Living Person.*— Libels against individuals have a direct tendency to provoke violent retaliation, and thereby cause breaches of the public peace, and, because of this tendency, they are regarded and punished as a misdemeanor at common law.[86] In most

[84] State v. Buckley, 5 Harr. (Del.) 508; State v. Webb, 25 Iowa, 235; State v. Thornton, Busb. (N. C.) 252.

[85] Cable v. State, 8 Blackf. (Ind.) 531; Price v. State, 96 Ala. 1.

[86] Gregory v. Reg., 15 Q. B. 957, 5 Cox, C. C. 247;

states, libel is now punished by statute. Any publication by writing, etc., which is calculated to defame a person, and to expose him to ridicule, hatred, or contempt, is a libel.[87] To maliciously publish, either by direct statement, or by innuendo, insinuation, irony, or otherwise,[88] that a person is guilty of a crime, is clearly a libel.[89] It has also been held a libel to publish of a person that he has, as a juror, been guilty of misconduct in staking a verdict upon chance,[90] or that he is a rascal, scoundrel, cheat, etc.[91] A malicious publication which imputes dishonesty or incapacity to a man in his trade or profession is indict-

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Rex v. Critchley, 4 Term R. 129, note; Com. v. Chapman, 13 Metc. (Mass.) 68; State v. Burnham, 9 N. H. 34; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

[87] Steph. Dig. Crim. Law, art. 269; Gregory v. Reg., 15 Q. B. 957, 5 Cox, C. C. 247; Barthelemy v. People, 2 Hill (N. Y.) 248; State v. Henderson, 1 Rich. (S. C.) 180; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

[88] Steph. Dig. Crim. Law, art. 269.

[89] 2 Whart. Crim. Law, § 1596; Smith v. State, 32 Tex. 594.

[90] Com. v. Wright, 1 Cush. (Mass.) 46.

[91] See Williams v. Karnes, 4 Humph. (Tenn.) 9.

able as a libel.[92] The same is true of a publication imputing to a man or woman the commission of adultery or other immoral conduct.[93] In an English case, the words published were: "Why should T. be surprised at anything Mrs. W. does? If she chooses to entertain B., she does what very few will do; and she is, of course, at liberty to follow the bent of her own inclining, by inviting all expatriated foreigners, who crowd our streets, to her table, if she thinks fit,"—and an indictment was sustained.[94]

To be indictable, a defamatory libel need not necessarily refer to any one particular person. It may refer to a body of persons, if definite and small enough for its individual members to be recognized as such.[95] Thus, a religious society of nuns may be libeled by suggesting immorality and the birth of illegitimate children in their nunnery.[96]

[92] 2 Whart. Crim. Law, § 1597; Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145.

[93] Reg. v. Gathercole, 2 Lewin, C. C. 237; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

[94] Gregory v. Reg., 15 Q. B. 957, 5 Cox, C. C. 247.

[95] Steph. Dig. Crim. Law, art. 267.

[96] Reg. v. Gathercole, 2 Lewin, C. C. 237.

A libel may be published against "certain per-

(*c*) *Against a Dead Person.*—The publication of a libel on the character of a dead person is a misdemeanor if it is calculated to throw discredit on living persons, and so provoke them to a breach of the peace, but not otherwise.[97]

(*d*) *Things Capable of Being Libels.*—Any words or signs conveying defamatory matter marked upon any substance, and anything which, by its own nature, conveys defamatory matter, may be a libel, as a letter, or a passage in a newspaper or book, words written on a wall, a picture, a gallows set up before a man's door, etc.[98] Words spoken, or mere verbal slander, concerning a private individual only, are not indictable at common law, though they are punished in some jurisdictions by statute.[99]

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sons lately arrived from Portugal, and living near Brood street," though no particular person is mentioned or referred to. Rex v. Osborne, 2 Keb. 230.

[97] Steph. Dig. Crim. Law, art. 267; Rex v. Topham, 4 Term R. 126; Rex v. Critchley, 4 Term R. 129, note; Com. v. Taylor, 5 Binn. (Pa.) 277.

[98] Steph. Dig. Crim. Law, art. 268.

[99] Steph. Dig. Crim. Law, art. 268; State v. Wakefield, 8 Mo. App. 11.

(*e*) *Publication.*—To publish a libel is to deliver it, read it, or communicate its purport in any other manner, or to exhibit it to any person other than the person libeled, provided the person making the publication knows, or has an opportunity of knowing, the contents of the libel.[100] Publication is necessary.[101] If the libel is placed where others may see it, there is a publication, whether others do in fact see it or not.[102] It has been held in several cases that a libel is sufficiently published to support an indictment if it is sent to the person libeled,[103] but it is doubtful whether this is the law, unless it is sent with the intention of provoking a breach of the peace, for a libel exhibited only to the person libeled cannot expose him to hatred, ridicule, or contempt.[104]

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[100] Steph. Dig. Crim. Law, art. 270; Rex v. Burdett, 4 Barn. & Ald. 95.

[101] See the cases above cited. And see State v. Barnes, 32 Me. 530.

[102] Rex v. Burdett, 4 Barn. & Ald. 95; Giles v. State, 6 Ga. 276

[103] Phillips v. Jansen, 2 Esp. 624; Reg. v. Brooke, 7 Cox, C. C. 251; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105. Compare Rex v. Wegener, 2 Stark. 245.

[104] 2 Whart. Crim. Law, § 1619; Rex v. Wegener, 2 Stark. 245.

(*f*) *Malice.*—The publication of a libel, to be indictable as a misdemeanor, must be malicious, but this does not mean that there must be ill will or actual malice towards the person libeled, or even that there shall be any general bad design or intent. If a libel is published willfully, and without sufficient cause or excuse, as explained in the following paragraphs, it is published maliciously.[105] "Malice," in the law of libel, means a publication "intentionally and without just cause or excuse."[106] Malice is inferred as a presumption of fact from the publication, unless justification or excuse is shown.[107]

(*g*) *Truth of Publication.*—At common law, the fact that the publication is true is no justification, but by statutes in England and in this country, the common-law rule has been so far modified that the truth of the publication may be shown, and will con-

[105] Steph. Dig. Crim. Law, art. 271; Bromage v. Prosser, 4 Barn. & C. 247; Com. v. Snelling, 15 Pick. (Mass.) 337; Com. v. Bonner, 9 Metc. (Mass.) 410; Haley v. State, 63 Ala. 83.

[106] Bromage v. Prosser, supra; Com. v. Snelling, supra.

[107] Barthelemy v. People, 2 Hill (N. Y.) 248.

stitute a defense, if it is made to appear that the publication was made with good motives, and for justifiable ends, or that it was for the public benefit.[108] Unless this is made to appear, the truth of the publication is no justification or excuse, even under the statutes.[109]

(*h*) *Privileged Communications* — (*1*) *In General.*—The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing it is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, provided the publication does not exceed, either in extent or in manner, what

[108] See 6 & 7 Vict. c. 96, § 8; Steph. Dig. Crim. Law, art. 272; Rex v. Burdett, 4 Barn. & Ald. 95; Reg. v. Newman, 1 El. & Bl. 268, Dears. C. C. 85; Com. v. Snelling, 15 Pick. (Mass.) 337; Com. v. Damon, 136 Mass. 441; State v. Lehre, 2 Brev. (S. C.) 446.

[109] Com. v. Snelling, supra.

is reasonably sufficient for the occasion.[110] This rule does not protect communications containing false defamatory matter made maliciously, and to injure the person to whom they relate.[111]

(*2*) *Fair Criticism.*—The publication of a libel is not a misdemeanor if the defamatory matter consists of comments upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided such comments are fair.[112] Every person who takes a public part in public affairs, either by becoming a candidate for office, or by holding public office, or otherwise, submits his conduct therein to criticism.[113] And every person

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[110] Steph. Dig. Crim. Law, art. 273. See Beatson v. Skene, 5 Hurl. & N. 838; Todd v. Hawkins, 8 Car. & P. 88; Com. v. Blanding, 3 Pick. (Mass.) 304; Lewis v. Chapman, 16 N. Y. 369; Byam v. Collins, 111 N. Y. 143; Fowles v. Bowen, 30 N. Y. 20; State v. Lonsdale, 48 Wis. 348.

[111] Com. v. Blanding, 3 Pick. (Mass.) 304; Byam v. Collins, 111 N. Y. 143.

[112] Steph. Dig. Crim. Law, art. 274.

[113] Steph. Dig. Crim. Law, art. 274; Henwood v. Harrison, L. R. 7 C. P. 606; Harrison v. Bush, 5 El. & Bl. 344; State v. Burnham, 9 N. H. 34; Vanderzee v. McGregor, 12 Wend. (N. Y.) 545,

who publishes any book or other literary production, or any work of art, or any advertisement of goods, submits the book, or literary production, or work of art, or advertisement, to public criticism.[114] In like manner, any person who takes part in any dramatic performance, or other public exhibition or entertainment, submits himself or herself to public criticism to the extent to which he or she takes part in it.[115] A fair comment within the rule above stated is a comment which is either true, or which, if false, expresses the real opinion of its author, such opinion having been formed with a reasonable degree of care, and on reasonable grounds.[116]

(*3*) *Legislative Proceedings, Public Meetings, and Comments Thereon.*—It is

27 Am. Dec. 156; Bodwell v. Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228; Com. v. Clap, 4 Mass. 163; State v. Balch, 31 Kan. 465; Negley v. Farrow, 60 Md. 158.

[114] Steph. Dig. Crim. Law, art. 274; Carr v. Hood, 1 Camp. 355; Thompson v. Shackell, 1 Mood. & M. 187; Jenner v. A'Beckett, L. R. 7 Q. B. 11.

[115] Steph. Dig. Crim. Law, art. 274; Dibdin v. Swan, 1 Esp. 28.

[116] Steph. Dig. Crim. Law, art. 274; Hunter v. Sharpe, 4 Fost. & F. 983.

not a misdemeanor to publish such of the reports, papers, votes, or proceedings of a legislative assembly as such assembly may deem fit or necessary to be published, or any extract from, or abstract of, such reports, papers, votes, or proceedings, if the publication is in good faith, and without malice, or to publish a fair report of any debate in a legislative assembly, even though such publication may contain matter defamatory of the character of individuals.[117] It is a libel, however, to publish a report of a *public meeting* if it contains such matter, although the report may be fair, and may be published in order to give the public information, and not in order to injure the person to whom the defamatory matter relates.[118] A member of the legislature is not indictable for defamatory matter published by him in the due course of legislative proceedings.[119]

(*4*) *Proceedings in Courts of Justice.*— It is not a misdemeanor to publish anything

[117] Steph. Dig. Crim. Law, art. 275; Mason v. Walter, L. R. 4 Q. B. 73.

[118] Steph. Dig. Crim. Law, art. 275; Davison v. Duncan, 7 El. & Bl. 231.

[119] See Coffin v. Coffin, 4 Mass. 1.

whatever in a judicial proceeding before a court of competent jurisdiction, civil or military, even though the person publishing knows that the matter is false, and publishes it in order to injure the person to whom it relates.[120]

(*5*) *Report of Judicial Proceedings.*— Nor is it a misdemeanor to publish a fair report of the proceedings in a court of justice, or *ex parte* proceedings of a judicial nature, though it may defame the character of an individual, provided the publication does not amount to a seditious, blasphemous, or obscene libel.[121] Such a report is not fair when partial, but it is fair when it is substantially accurate, and when it is either complete, or condensed in such a manner as to give a just impression of what took

[120] Steph. Dig. Crim. Law, art. 276; Cutler v. Dixon, 4 Coke, 14b; Henderson v. Broomhead, 4 Hurl. & N. 569, 576; Dawkins v. Lord Paulet, L. R. 5 Q. B. 94; Com. v. Blanding, 3 Pick. (Mass.) 304.

[121] Steph. Dig. Crim. Law, art. 277; Curry v. Walter, 1 Bos. & P. 525; Ryalls v. Leader, L. R. 1 Exch. 296, 300; Lewis v. Levy, El., Bl. & El. 537; Com. v. Blanding, 3 Pick. (Mass.) 304; Thompson v. Powning, 15 Nev. 195.

place.[122] This rule does not protect comments made by the reporter, or reports of observations made by persons not entitled to take part in the proceedings.[123]

429. Malicious Mischief.—Malicious injury to the property of another is a misdemeanor at common law. In most jurisdictions it is now expressly punished by statute.

The offense of malicious mischief, which consists in maliciously destroying or injuring the property of another, has already been considered at some length in treating of offenses against the property of individuals. When such an act is done under such circumstances as to constitute an actual breach of the public peace, it is clearly punishable at common law; and, by the weight of authority, such an act is punishable, even when there is no actual breach of the peace, because it has a direct tendency to provoke violent retaliation, and thereby cause a breach of the peace. The subject is now covered in most jurisdictions, if not in all, by

122 Steph. Dig. Crim. Law, art. 277; Lewis v. Levy, El., Bl. & El. 537, 551.

123 Steph. Dig. Crim. Law, art. 277; Lewis v. Levy, El., Bl. & El. 537, 539; Delegal v. Highley, 3 Bing. N. C. 960, 961.

statute, so that resort to common-law authority is not necessary.[124]

II. OFFENSES AFFECTING THE ADMINISTRATION OF JUSTICE OR OF GOVERNMENT.

430. In General.—Any act which injuriously affects, obstructs, or corrupts the administration of public justice, or the administration of the government, or which has a direct tendency to do so, is a misdemeanor at common law.

It is obvious that public policy requires the punishment of acts which corrupt or obstruct, or which have a direct tendency to corrupt or obstruct, the administration of justice and of the government, and it is safe to say that any such act is punishable as a misdemeanor at common law.[125] For this

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[124] Ante, § 388.

[125] 4 Bl. Comm. 127 et seq.; Reg. v. Burgess, 16 Q. B. Div. 141; Com. v. Callaghan, 2 Va. Cas. 460, Beale's Cas. 116; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; State v. McNally, 34 Me. 210, 56 Am. Dec. 651; State v. DeWitt, 2 Hill (S. C.) 282, 27 Am. Dec. 371; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; Com. v. Silsbee, 9 Mass. 417.

It is a misdemeanor at common law to hinder or dissuade a witness from attending before a court in obedience to a summons, Com. v. Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665; or to even attempt to deter a witness from attending a

reason, the common law punishes bribery and other misconduct of judicial and other officers, bribery of jurors, or otherwise tampering with jurors, champerty and maintenance, compounding felonies, obstructing officers in the service of process, etc., perjury and subornation of perjury, bribery and fraud in connection with public elections, and many other offenses. These specific offenses will be considered in the following sections.

431. Perjury and Subornation of Perjury—(a) Definitions.—Perjury, at common law, is the wilful and corrupt taking of a false oath in a judicial proceeding, in regard to a matter material to the issue.[126] It is extended by statute, in most jurisdictions, to false swearing not in a judicial proceeding. It is a misdemeanor at common law. To constitute the offense,

1. The testimony must be false, or believed to be false, or the witness must not know whether it is true or false.

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trial, although the attempt is made before the service of a subpoena, and although it is unsuccessful. State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

[126] 3 Inst. 164; 1 Hawk. P. C. c. 69, § 1; 4 Bl. Comm. 153; Coyne v. People, 124 Ill. 17, 7 Am. St. Rep. 324; People v. Fox, 25 Mich. 492.

2. The taking of the false oath must be both willful and corrupt.
3. The matter sworn to must be material to the issue or question in controversy.
4. Some form of oath, or its equivalent, is essential, and it must be duly administered by an officer authorized to administer it.
5. The oath itself, as well as the facts sworn to, must be material.
6. To constitute perjury in a judicial proceeding the court or tribunal must have jurisdiction.

Subordination of perjury is the procuring another to commit perjury. To constitute this offense,

1. The testimony of the witness suborned must be false.
2. It must be given willfully and corruptly by the witness.
3. The suborner must know that the testimony to be given by the witness will be false.
4. And he must know or believe that the witness will willfully and corruptly testify falsely.

Taking a false oath willfully and corruptly, though it may not amount technically to perjury, is a misdemeanor at common law.[127]

(*b*) *The Proceedings in Which Perjury may be Committed.*—At common law, false

[127] Ex parte Overton, 2 Rose, 257; Reg. v. Hodgkiss, L. R. 1 C. C. 212, 11 Cox, C. C. 365; Reg. v. Chapman, 1 Den. C. C. 423, 2 Car. & K. 846, 3 Cox, C. C. 467.

swearing, to constitute perjury, must be in a judicial proceeding,[128] but in most states, if not in all, the offense has been extended by statute to include false swearing in many other cases.[129] Either at common law, or under particular statutes, it has been held that a charge of perjury may be predicated upon a false oath to procure a marriage license,[130] and other extrajudicial oaths;[131]

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[128] 3 Inst. 164; 1 Hawk. P. C. c. 69, § 1; Rex v. Aylett, 1 Term R. 63, 69, per Lord Mansfield; State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270.

[129] Thus, in New Jersey, a statute designates the officers before whom "all oaths, affirmations, and affidavits required to be made or taken by any statute of this state, or necessary or proper to be made, taken, or used in any court of this state, or for any lawful purpose whatever, excepting official oaths, oaths required to be taken in open court, or upon notice," and declares it to be perjury to willfully and corruptly swear or affirm falsely in or by any such oath, affirmation, or affidavit. See State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270.

[130] Call v. State, 20 Ohio St. 330; Warwick v. State, 25 Ohio St. 21; Harkreader v. State, 35 Tex. Cr. R. 243, 60 Am. St. Rep. 40.

[131] As a false oath on an inquiry before the legislature, Ex parte McCarthy, 29 Cal. 395, 401; or on a hearing before referees, State v. Keene, 26 Me. 33; or arbitrators, State v. Stephenson, 4 McCord

upon a false affidavit made for the purpose of instituting a criminal prosecution, or of procuring a warrant of arrest,[132] or a search warrant;[133] upon a false poor debtor's or insolvent debtor's oath;[134] a false oath in naturalization proceedings;[135] a false oath to an answer in chancery,[136] or on a motion for a continuance,[137] or for a new trial;[138] a false oath in justification of the sureties

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(S. C.) 165; Reg. v. Hallett, 2 Den. C. C. 237, 5 Cox, C. C. 238; State v. Keene, 26 Me. 33; a false affidavit by a drafted man, claiming exemption from military service, U. S. v. Sonachall, 4 Biss. 425, Fed. Cas. No. 16,352; a false affidavit as to the capital stock of a bank, required by statute, State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; a false affidavit of verification required by law to chattel mortgages, State v. Estabrooks (Vt.) 41 Atl. 499.

[132] State v. Cockran, 1 Bailey (S. C.) 50; Pennaman v. State, 58 Ga. 336; Shell v. State, 148 Ind. 50.

[133] Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116.

[134] Arden v. State, 11 Conn. 408; Com. v. Calvert, 1 Va. Cas. 181.

[135] U. S. v. Jones, 14 Blatchf. 90, Fed. Cas. No. 15,491; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Rump v. Com., 30 Pa. St. 475; Pankey v. People, 2 Ill. 80.

[136] Reg. v. Yates, Car. & M. 132.

[137] State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; State v. Johnson, 7 Blackf. (Ind.) 49; State v.

on a bail bond or appeal bond;[139] a false affidavit for a writ of *habeas corpus;*[140] a false oath by a juror when examined on his *voir dire;*[141] and false testimony before a grand jury.[142]

(*c*) *Falsity of Testimony.*—To constitute perjury, the testimony or statement must be false, or the party must believe it to be false.[143] One who believes that he is testifying falsely, or who does not know whether his testimony is true or false, may be guilty of perjury, though he may in fact speak the truth.[144] A person may commit perjury

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Winstandley, 151 Ind. 316; State v. Matlock, 48 La. Ann. 663.

[138] State v. Chandler, 42 Vt. 446.

[139] Com. v. Hatfield, 107 Mass. 227; Com. v. Butland, 119 Mass. 317; Territory v. Weller, 2 N. M. 470.

[140] White v. State. 1 Smedes & M. (Miss.) 149.

[141] State v. Howard, 63 Ind. 502; State v. Wall, 9 Yerg. (Tenn.) 347; Com. v. Stockley, 10 Leigh (Va.) 678.

[142] Reg. v. Hughes, 1 Car. & K. 519; State v. Offutt, 4 Blackf. (Ind.) 355; State v. McCormick, 52 Ind. 169; State v. Terry, 30 Mo. 368; State v. Schill, 27 Iowa, 263; State v. Green, 24 Ark. 591.

[143] State v. Trask, 42 Vt. 152.

[144] 3 Inst. 166; 1 Hawk. P. C. c. 69, § 6; Rex v. Edwards, Russ. Crimes, 294; State v. Gates, 17 N.

either by swearing to a fact which he knows is not true, or by swearing to his knowledge or belief as to a fact, when he has no such knowledge or belief.[145]

(*d*) *Knowledge and Intent.*—It is essential, at common law, that the taking of the false oath shall be both willful and corrupt. Testifying falsely by mistake, however negligently or inconsiderately, is not perjury.[146]

H. 373; State v. Cruikshank, 6 Blackf. (Ind.) 62; People v. McKinney, 3 Park. Cr. R. (N. Y.) 510.

[145] Rex v. Pedley, 1 Leach, C. C. 325; Reg. v. Schlesinger, 10 Q. B. 670, 2 Cox, C. C. 200; U. S. v. Atkins, 1 Sprague, 558, Fed. Cas. No. 14,474.

But perjury cannot be predicated upon the testimony of a witness in giving his estimate of value, or otherwise stating his opinion, unless it appears that he made misstatements of fact, or did not answer according to his belief. In re Howell, 114 Cal. 250.

[146] Rex v. Smith, 2 Show. 165; U. S. v. Shellmire, Bald. 370, 378, Fed. Cas. No. 16,271; Lyle v. State, 31 Tex. Cr. R. 103; Cothran v. State, 39 Miss. 541; Miller v. State, 15 Fla. 577, 585; State v. Cockran, 1 Bailey (S. C.) 50; Lambert v. People, 76 N. Y. 220; Green v. State, 41 Ala. 419; Nelson v. State, 32 Ark. 192; Thomas v. State, 71 Ga. 252; Rowe v. State, 99 Ga. 706.

Not only must the false swearing be willful, but it must be corrupt, or intentionally false, and it is error, therefore, at common law, to instruct

For this reason, the fact that a person has given contradictory testimony on different occasions does not show that he has committed perjury, for he may, on each occasion, have believed his testimony to be true.[147] It has been held that it is perjury for a witness to swear willfully and deliberately

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the jury to convict if the false swearing was willful, without also stating substantially that it must have been corrupt. Cothran v. State, 39 Miss. 541. Compare Brown v. State, 57 Miss. 424.

"Whatever evil intent may be alleged in the indictment as moving the defendant to take the false oath, the very taking of it must be stated to have been done deliberately, and with a wicked purpose, at that moment existing. This has been expressed by applying the terms 'willful' and 'corrupt' to the act of swearing." State v. Carland, 3 Dev. (N. C.) 114. To allege that the oath was taken "falsely and maliciously" is not enough. Id.

An honest oath under advice of counsel is not perjury. U. S. v. Stanley, 6 McLean, 409, Fed. Cas. No. 16,376; U. S. v. Conner, 3 McLean, 573, Fed. Cas. No. 14,847; Com. v. Clark, 157 Pa. St. 257. But it is otherwise if the accused acted in bad faith, knowing the testimony or statement was false, and sought the advice as a mere cover to secure immunity from the penalty of the crime. Tuttle v. People, 36 N. Y. 431.

[147] Jackson's Case, 1 Lewin, C. C. 270. And see Schwartz v. Com., 27 Grat. (Va.) 1025, 21 Am. Rep. 365.

to what is false, when he has no probable cause to believe it to be true, though he may believe it to be true,[148] but this view cannot be sustained. A witness who states what he believes to be true cannot be guilty of *willful* and *corrupt* false swearing, however negligent or careless he may be in his belief.[149]

(*e*) *Materiality of Testimony, etc.*—(*1*) *In General.*—In order that perjury may be predicated upon false testimony, or upon a false affidavit, the matter sworn to must have been material to the issue or question in controversy.[150] And the materiality must

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[148] Com. v. Cornish, 6 Binn. (Pa.) 249; State v. Knox, Phil. (N. C.) 312. And see Johnson v. People, 94 Ill. 505.

[149] U. S. v. Shellmire, Baldw. 370, 378, Fed. Cas. No. 16,271. And see Thomas v. State, 71 Ga. 252. A witness is not guilty of perjury in falsely swearing to a fact, to the best of his opinion, if he believes it to be true, though without any reasonable cause. Com. v. Brady, 5 Gray (Mass.) 78.

[150] Rex v. Aylett, 1 Term R. 63, 69, per Lord Mansfield; Reg. v. Tate, 12 Cox, C. C. 7; State v. Hattaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580; Gibson v. State, 44 Ala. 17; Wood v. People, 59 N. Y. 117; Pollard v. People, 69 Ill. 148; People v. McDermott, 8 Cal. 288; Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72; People v. Collier, 1 Mich. 137, 48 Am. Dec. 699; Martin v. Miller, 4

be shown. It will not be presumed.[151] Whether it was material or not depends, of course, upon the circumstances of the particular case. "Testimony," said the New Hampshire court, "tending to affect the verdict of the jury, or extenuating or increasing the damage, and thus influencing the judgment of the court, is material."[152]

Mo. 47, 28 Am. Dec. 342; Rahm v. State, 30 Tex. App. 310, 28 Am. St. Rep. 911; Crump v. Com., 75 Va. 922; Rhodes v. Com., 78 Va. 692; State v. Meader, 54 Vt. 126; State v. Trask, 42 Vt. 152; State v. Brown (N. H.) 38 Atl. 731; People v. Jones, 123 Cal. 299.

Thus, where a witness swore to a particular fact, which was material, and that he was present when it occurred, and afterwards, when asked where he lived at the time, testified that he lived near the parties, which was false, it was held that this was too remote from the issue to constitute perjury. State v. Hathaway, 2 Nott & McC. (S. C.) 118, 10 Am. Dec. 580.

Under the present statute in South Carolina it has been held that materiality is not necessary. State v. Byrd, 28 S. C. 18, 13 Am. St. Rep. 660.

[151] Wood v. People, 59 N. Y. 117; State v. Aikens, 32 Iowa, 403; Nelson v. State, 32 Ark. 192; Com. v. Pollard, 12 Metc. (Mass.) 225.

[152] Per Upham, J., in State v. Norris, 9 N. H. 96. And see State v. Meader, 54 Vt. 126. See, also, infra, this section.

(*2*) *Collateral Matters.*—The rule that the false swearing must be as to a matter material to the issue or question in controversy does not mean that it must be material directly to the main issue or question. It may be as to a collateral matter, if it affects the issue.[153] It is perjury to swear falsely as to any material circumstance which has a legitimate tendency to prove or disprove the fact in issue.[154] And it is perjury to swear falsely as to any collateral issue arising in the course of an action or proceeding.[155] A

[153] 1 Hawk. P. C. c. 69, § 3; Rex v. Griepe, 12 Mod. 139, Holt, 535, 1 Ld. Raym. 256; State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; Jacobs v. State, 61 Ala. 448; State v. Lavalley, 9 Mo. 834; Wood v. People, 59 N. Y. 117; State v. Brown, 79 N. C. 642; Com. v. Pollard, 12 Metc. (Mass.) 225.

[154] Com. v. Grant, 116 Mass. 17; Williams v. State, 68 Ala. 551; Robinson v. State, 18 Fla. 898; Com. v. Pollard, 12 Metc. (Mass.) 225; State v. Wakefield, 73 Mo. 549; Dilcher v. State, 39 Ohio St. 130; Bradberry v. State, 7 Tex. App. 375; Lawrence v. State, 2 Tex. App. 479; State v. Hunt, 137 Ind. 537.

Testimony tending to corroborate evidence concerning a material matter is material. Com. v. Parker, 2 Cush. (Mass.) 212; Wood v. People, 59 N. Y. 117.

[155] Jacobs v. State, 61 Ala. 448; State v. John-

charge of perjury may be predicated upon false testimony tending to increase or mitigate the damages;[156] false testimony for the purpose of procuring the admission in evidence of a document that is material to the issue;[157] false testimony affecting the credibility of the defendant as a witness, or of any other material witness.[158] And such a charge may be based upon a false affidavit

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son, 7 Blackf. (Ind.) 49; State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485.

[156] State v. Keenan, 8 Rich. (S. C.) 456; Stephens v. State, 1 Swan (Tenn.) 157; State v. Swafford, 98 Iowa, 362.

[157] Reg. v. Phillpotts, 3 Car. & K. 135, 2 Den. C. C. 302, 5 Cox, C. C. 363.

[158] Rex v. Griepe, 12 Mod. 139, Holt. 535, 1 Ld. Raym. 256; Reg. v. Overton, Car. & M. 655; Reg. v. Tyson, L. R. 1 C. C. 107, 11 Cox, C. C. 1; Wood v. People, 59 N. Y. 117; People v. Courtney, 94 N. Y. 490; People v. Barry, 63 Cal. 62; U. S. v. Landsberg, 21 Blatchf. 169, 23 Fed. 585; State v. Mooney, 65 Mo. 494; State v. Brown, 79 N. C. 642; People v. Macard, 109 Mich. 623; State v. Park, 57 Kan. 431.

In Leak v. State, 61 Ark. 599, it was held that where, on a criminal prosecution, there is total failure of proof warranting a conviction of the accused, a witness falsely denying having testified to certain facts before the grand jury, when questioned for the purpose of impeaching his testi-

on a motion for a continuance,[159] or for a new trial.[160]

(*3*) *Incompetent Evidence.*—If the evidence was material, the false swearing is none the less perjury because it was incompetent, and would have been excluded if objected to,[161] or because it was afterwards withdrawn.[162] Thus, a charge of perjury may be based upon false oral testimony as to a promise within the statute of frauds.[163]

(*4*) *Affidavit or Deposition not Used or Informal.*—Nor is a false affidavit or deposition, which was material when made, any the less perjury because it was not used,[164]

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mony, cannot be convicted of perjury, as his denial is immaterial.

Where the evidence of a witness in chief is immaterial, false testimony on cross examination as to matters affecting his credibility only is not perjury. Stanley v. U. S., 1 Okl. 336.

[159] State v. Shupe, 16 Iowa, 36, 85 Am. Dec. 485; State v. Johnson, 7 Blackf. (Ind.) 49.

[160] State v. Chandler, 42 Vt. 446.

[161] Reg. v. Gibbon, Leigh & C. 109, 9 Cox, C. C. 105; Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255; Howard v. Sexton, 4 N. Y. 157.

[162] Reg. v. Phillpotts, 3 Car. & K. 135, 2 Den. C. C. 302, 5 Cox, C. C. 363.

[163] Howard v. Sexton, 4 N. Y. 157.

[164] Rex v. Crossley, 7 Term R. 315; Rex v.

or because it was excluded, or would have been excluded, for some informality.[165] This does not apply, however, to an affidavit, such as an affidavit for an attachment or a continuance, which fails to state the facts necessary to entitle the party to the relief sought.[166]

(*5*) *Evidence not Affecting Verdict or Decision.*—In no case is it any defense to say that the court or jury did not give credit to the testimony, or that, for any other reason, the verdict or judgment was not influenced thereby.[167] "It is the act of false swearing in respect to a matter material to the point of inquiry which constitutes the crime, and not the injury which it might have done to individuals, or the degree of

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White, Mood. & M. 271; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; State v. Cockran, 1 Bailey (S. C.) 50. Compare Morrell v. People, 32 Ill. 499.

[165] Rex v. Hailey, 1 Car. & P. 258, Ryan & M. 94 (informality as to jurat); Reg. v. Christian, Car. & M. 388 (informality in title); State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270.

[166] Hood v. State, 44 Ala. 81; State v. Hobbs, 40 N. H. 229.

[167] Hamper's Case, 2 Leon, 230; Pollard v. People, 69 Ill. 148; Wood v. People, 59 N. Y. 117.

credit which was given to the testimony." [168] The fact that the issue concerning which a witness testifies falsely is afterwards admitted does not render the testimony immaterial.[169]

(6) *Incompetency of Witness.*—A person who has been sworn as a witness, and who has testified falsely as to a matter material to the issue, is none the less guilty of perjury because he was not competent as a witness in the case, or competent to testify as to the particular facts.[170]

(7) *Privileged Testimony.*—And when a witness voluntarily testifies as to matters concerning which he might refuse to answer on the ground that his answer might tend to criminate him, he is guilty of per-

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[168] Per McAllister, J., in Pollard v. People, 69 Ill. 148.

[169] People v. Hitchcock, 104 Cal. 482.

[170] It was so held in Chamberlain v. People, 23 N. Y. 85, 80 Am. Dec. 255, where, in a suit for divorce on the ground of adultery, the husband, his wife having borne a child, testified falsely that he had had no intercourse with her during their marriage. See, also, Montgomery v. State, 10 Ohio, 220; State v. Molier, 1 Dev. (N. C.) 263; Sharp v. Wilhite, 2 Humph. (Tenn.) 434. Contra, Reg. v. Clegg, 19 Law Times (N. S.) 47.

jury if his testimony is willfully and corruptly false.[171]

(*8*) *Voluntary Attendance.*—It can make no difference that the accused attended as a witness voluntarily, and without the service of a subpœna.[172]

(*f*) *The Oath*—(*1*) *In General.*—Some form of oath, or its equivalent, is absolutely essential.[173] And it must have been duly administered by an officer authorized to admin-

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[171] Mackin v. People, 115 Ill. 312, 56 Am. Rep. 167; State v. Maxwell, 28 La. Ann. 361; Mattingly v. State, 8 Tex. App. 345. In Kentucky it has been held that this is true, though the accused may have been required to testify, against his objection. Com. v. Turner, 98 Ky. 526.

[172] Com. v. Knight, 12 Mass. 273, 7 Am. Dec. 72.

[173] O'Reilly v. People, 86 N. Y. 154, 40 Am. Rep. 525. In this case, the accused had handed to an officer, authorized to take and certify affidavits, an affidavit previously signed by him, and reciting that he had been duly sworn, and the officer affixed his own signature to the jurat without any words or formalities. It was held that a charge of perjury could not be predicated of the transaction, because there was no oath. See, also, Case v. People, 76 N. Y. 242.

"The word 'oath' includes every affirmation which any class of persons are by law permitted to make in the place of an oath." Steph. Dig.

ister it,[174] or before a court having jurisdiction to administer it.[175] As was said in

Crim. Law, art. 135; State v. Whisenhurst, 2 Hawks (N. C.) 458.

[174] 1 Hawk. P. C. c. 69, § 4; Rex v. Verelst, 3 Camp. 432; Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293; Morrell v. People, 32 Ill. 499; Van Dusen v. People, 78 Ill. 645; Muir v. State, 8 Blackf. (Ind.) 154; State v. Phippen, 62 Iowa, 54; Biggerstaff v. Com., 11 Bush (Ky.) 169; State v. Cannon, 79 Mo. 343; State v. Jackson, 36 Ohio St. 281; Straight v. State, 39 Ohio St. 496; U. S. v. Curtis, 107 U. S. 671.

Perjury cannot be predicated upon an affidavit sworn before a notary public professing to act in a state of which he is a nonresident, and of which he was a nonresident at the time of his appointment. Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293.

"The expression 'duly administered' means administered in a form binding on his conscience, to a witness legally called before them, by any court, judge, justice, officer, commissioner, arbitrator, or other person, who, by the law for the time being in force, or by consent of the parties, has authority to hear, receive, and examine evidence." Steph. Dig. Crim. Law, art. 135.

"The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience." Steph. Dig. Crim. Law, art. 135; Sells v. Hoare, 3 Brod. & B. 232; State v. Whisenhurst, 2 Hawks (N. C.) 458.

[175] Reg. v. Pearce, 3 Best & S. 531, 9 Cox, C. C.

a New York case: "To make a valid oath, for the falsity of which perjury will lie, there must be, in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant takes upon himself the obligation of an oath." [176]

If the oath is legally administered by an authorized officer, mere informalities will not invalidate it.[177] And if a particular form of oath or affidavit is prescribed by statute, a substantial compliance with the statute is sufficient.[178] It has been said that an oath administered by an officer *de facto* is sufficient,[179] but the weight of authority is to the contrary. If a particular officer was authorized to administer the oath, and

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258; Com. v. White, 8 Pick. (Mass.) 458. And see infra, this section.

[176] O'Reilly v. People, 86 N. Y. 154, 40 Am. Rep. 525.

[177] State v. Keene, 26 Me. 33. And see Walker v. State, 107 Ala. 5.

[178] State v. Dayton, 23 N. J. Law, 49, 53 Am. Dec. 270; State v. Gates, 17 N. H. 373. See State v. Whisenhurst, 2 Hawks (N. C.) 458.

[179] People v. Cook, 8 N. Y. 67, 89; Lambert v. People, 76 N. Y. 220, 32 Am. Rep. 293; Keator v. People, 32 Mich. 484.

it is shown that the person who administered it was acting as such officer, this is *prima facie* sufficient to show that it was lawfully administered;[180] but, according to the better opinion, the prosecution may be defeated by showing that the person was not an officer *de jure*.[181] An oath may be administered by any person in the presence and by direction of the court.[182]

(*2*) *Materiality of Oath.*—The oath itself, as well as the facts sworn to, must be material. A charge of perjury cannot be based upon a voluntary extrajudicial oath.[183] As was said by Judge Cooley in a Michigan case: "The facts sworn to may be material,

[180] State v. Hascall, 6 N. H. 352; Keator v. People, 32 Mich. 484; Reg. v. Roberts, 38 Law Times (N. S.) 690, 14 Cox, C. C. 101.

[181] Rex v. Verelst, 3 Camp. 432; Straight v. State, 39 Ohio St. 496; State v. Hayward, 1 Nott & McC. (S. C.) 546; Biggerstaff v. Com., 11 Bush (Ky.) 169; Walker v. State, 107 Ala. 5.

[182] State v. Knight, 84 N. C. 789; Stephens v. State, 1 Swan (Tenn.) 157.

[183] Reg. v. Bishop, Car. & M. 302; Silver v. State, 17 Ohio, 365; Linn v. Com., 96 Pa. St. 285; People v. Fox, 25 Mich. 492; Lamden v. State, 5 Humph. (Tenn.) 83; People v. Travis, 4 Park. Cr. R. (N. Y.) 213; U. S. v. Nickerson, 1 Sprague, 232, Fed. Cas. No. 15,878; Collins v. State, 33 Fla. 446.

and yet the false swearing be no perjury, because the oath performed no office in the case, and was wholly unimportant and immaterial." [184] For this reason, it has been held that perjury cannot be assigned upon a false oath to an answer in chancery, where the bill or the law did not call for an answer under oath.[185] The same is true of an affidavit to be used in a proceeding in a court having no jurisdiction.[186]

(*g*) *Jurisdiction of the Court or Tribunal.*—In order that a false oath in a judicial proceeding may constitute perjury, the court or tribunal must have jurisdiction of the cause or proceeding.[187] And, on a

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[184] Beecher v. Anderson, 45 Mich. 543.

[185] Silver v. State, 17 Ohio, 365; People v. Gaige, 26 Mich. 30; Beecher v. Anderson, 45 Mich. 543.

[186] State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196.

[187] Rex v. Aylett, 1 Term R. 63, 69, per Lord Mansfield; Rex v. Cohen, 1 Starkie, 511; Reg. v. Pearce, 3 Best & S. 531, 9 Cox. C. C. 258; Reg. v. Bacon, 11 Cox, C. C. 540; Com. v. Pickering, 8 Grat. (Va.) 628, 56 Am. Dec. 158; State v. Hall, 49 Me. 412; Com. v. White, 8 Pick. (Mass.) 453; Wilson v. State, 27 Tex. App. 47, 11 Am. St. Rep. 180; Pankey v. People, 2 Ill. 80.

An indictment for perjury will not lie for false

prosecution for perjury, such jurisdiction must be alleged and proved. It will not be presumed.[188] If the court had jurisdiction, mere errors or irregularities in the cause or proceeding are immaterial.[189]

(*h*) *Subornation of Perjury.*—Subornation of perjury is a misdemeanor at common law. It consists in procuring another to commit perjury by inciting, instigating, or persuading him to do so.[190]

To constitute this offense, the accused must have known that the witness intended to commit perjury. It is not enough to show that he knew the testimony would be false.[191] And the solicited perjury must have been committed.[192] If a witness is not guilty

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swearing before a committee illegally constituted. Com. v. Hillenbrand, 96 Ky. 407.

[188] Com. v. Pickering, 8 Grat. (Va.) 628, 56 Am. Dec. 158.

[189] State v. Lavalley, 9 Mo. 834; State v. Molier, 1 Dev. (N. C.) 263.

[190] 1 Hawk. P. C. c. 69, § 10; Com. v. Douglass, 5 Metc. (Mass.) 241.

[191] Com. v. Douglass, 5 Metc. (Mass.) 241; U. S. v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947; Stewart v. State, 22 Ohio St. 477; Coyne v. People, 124 Ill. 17, 7 Am. St. Rep. 324.

[192] Rex v. Johnson, 2 Show. 1.

of perjury, either because he does not know that his testimony is false, or for any other reason, one who has induced him to testify cannot be guilty of subornation of perjury.[193] What has been said, therefore, in the preceding sections, as to the oath, the falsity and materiality of the testimony, the intent, etc., is equally applicable in a prosecution for subornation of perjury.

432. Bribery—(a) Definition.—Bribery, at common law, and under the statutes, may be defined as the giving of anything of value to any person holding a public office, or to any person performing a public duty, or the acceptance thereof by any such person, with the intention that he shall be influenced thereby in the discharge of his legal

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[193] Coyne v. People, 124 Ill. 17, 7 Am. St. Rep. 324; Maybush v. Com., 29 Grat. (Va.) 857. In U. S. v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947, it is said: "The crime of subornation of perjury has several indispensable ingredients, which must be charged in the indictment, or it will be fatally defective. 1. The testimony of the witness suborned must be false. 2. It must be given willfully and corruptly by the witness, knowing it to be false. 3. The suborner must know or believe that the testimony of the witness given, or about to be given, will be false. 4. He must know or believe that the witness will willfully and corruptly testify to facts which he knows to be false." And see Watson v. State, 5 Tex. App. 11.

duty.[194] The offense is a misdemeanor at common law, but in some states it has been made a felony by statute.

To offer a bribe, or to solicit a bribe, is also a misdemeanor at common law.

(*b*) *Persons Who are the Subject of Bribery.*—Coke, Blackstone, and some of the other early writers, limit bribery at common law to judicial officers or other persons concerned in the administration of justice,[195] but, according to the weight of authority, the offense is not so narrow as this. It is defined by Bishop as "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done," and in a note he says the offense is

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[194] See 2 Bish. New Crim. Law, § 85; Rex v. Vaughan, 4 Burrows, 2494; Curran v. Taylor, 92 Ky. 537, 541; Dishon v. Smith, 10 Iowa, 212, 221; State v. Pritchard, 107 N. C. 921; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128.

[195] 3 Inst. 145; 4 Bl. Comm. 139, 157; Steph. Dig. Crim. Law, art. 126; 1 Hawk. P. C. c. 67, § 1.

Blackstone says: "Bribery is when a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in his office." 4 Bl. Comm. 139. See, also, 1 Russ. Crimes, 154; Watson v. State, 29 Ark. 299.

not confined to persons "in judicial place," as was stated by Coke, nor to persons "concerned in the administration of justice," as stated by Blackstone, but that it extends to "all officers connected with the administration of the government, executive, legislative, and judicial." [196] This view is amply supported by authority.[197] It is not even necessary that the person bribed shall be a public officer. It is enough if the duty in the performance of which he is influenced is a public duty. Thus, it is a misdemeanor at common law to bribe a voter at an election of public officers, or on a public question.[198]

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[196] 2 Bish. New Crim. Law, § 85, and note 1.

[197] Curran v. Taylor, 92 Ky. 537, 541; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707.

[198] In the late case of Curran v. Taylor, 92 Ky. 537, it was said that the common-law offense of bribery is committed by offering any undue reward or remuneration to any public officer or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duty. And it was held that the buying of votes at an election to take the sense of the voters of a county as to making a county subscription in aid of a railroad, while not within the Kentucky statute against bribery, was bribery

In most states, the offense is now defined by statute, so that there is little necessity to resort to the common law, except for general principles. Some of the statutes apply to particular officers only, as judicial officers,[199] state officers,[200] judicial, legislative, or executive officers.[201] *De facto* officers, as well as officers *de jure,* are persons with respect to whom bribery may be committed.[202]

(*c*) *The Bribe.*—The thing offered or ac-

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and a misdemeanor at common law. See, also, Rex v. Pitt, 3 Burrows, 1335, 1338; Rex v. Plympton, 2 Ld. Raym. 1377; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342.

[199] The expression "judicial officers" includes not only judges and justices, but also state, city, and county attorneys. State v. Currie, 35 Tex. 17; State v. Henning, 33 Ind. 189. And it includes arbitrators. State v. Lusk, 16 W. Va. 767.

[200] The words "officers of the state" include members of the legislature. State of Kansas v. Pomeroy, 1 Cent. Law. J. 411.

[201] Municipal officers, as well as state officers, are within such a statute. People v. Jaehne, 103 N. Y. 182; People v. Swift, 59 Mich. 529. A trustee of a township is an "executive officer." State v. McDonald, 106 Ind. 233.

[202] State v. Gardner, 54 Ohio St. 24; State v. Graham, 96 Mo. 120; Florez v. State, 11 Tex. App. 102.

cepted may be money, property, services, or anything else of value.[203] It must be of some value, but any value is sufficient.[204] It need not be of value at the time it is offered or promised.[205] Merely to keep "open house," and entertain, though for the purpose of unduly influencing legislation, has been held not to constitute bribery.[206]

(*d*) *The Intent.*—To constitute bribery, both at common law and under the statutes, there must be a corrupt intent to influence the officer or other person, or, on his part, to be influenced, in the discharge of his duties.[207] But it is not necessary, unless ex-

[203] Watson v. State, 39 Ohio St. 123.

[204] State v. McDonald, 106 Ind. 233. And see Caruthers v. State, 74 Ala. 406; Com. v. Chapman, 1 Va. Cas. 138; State v. Biebusch, 32 Mo. 276.

In Indiana, under a statute punishing as bribery the actual giving or receiving of anything of value, it was held that an officer who received a note could not be convicted, because the note, being unenforceable, was of no value. State v. Walls, 54 Ind. 561.

[205] Watson v. State, 39 Ohio St. 123.

[206] Randall v. Evening News Ass'n, 97 Mich. 136.

[207] State v. Pritchard, 107 N. C. 921; Hutchinson v. State, 36 Tex. 293; State v. Graham, 96 Mo. 120; White v. State, 103 Ala. 72; Johnson v. Com., 90 Ky. 53.

pressly required by a statute, that the act induced, or sought to be induced, shall favor, aid, or benefit the briber himself.[208] A person who gives money to an officer with corrupt intent to influence his official conduct is guilty of bribery, though the officer may receive the same without knowing what it is, and may keep it solely for the purposes of public justice.[209]

(*e*) *The Act Induced or Sought to be Induced.*—In accordance with the definition of bribery given above, the act which is induced or sought to be induced by the bribe must be an act in discharge of the legal duty of the person bribed. It is not bribery if the act is in discharge of a mere moral duty.[210] If an official act is induced, or sought to be induced, by a bribe, the fact that it is illegal, or in excess of the officer's power, jurisdiction, or authority is no defense.[211]

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[208] Glover v. State, 109 Ind. 391.

[209] Com. v. Murray, 135 Mass. 530.

[210] See Dishon v. Smith, 10 Iowa, 212, 221.

[211] Glover v. State, 109 Ind. 391; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707; State v. Potts, 78 Iowa, 656.

Thus, an offer of money to a member of a city council to vote in favor of an application for leave

It is bribery to give money to an officer, or for an officer to accept money, for the doing of an official act, though the act may be one which it is his duty to do,[212] as where money is paid an officer to induce him to release a person from an illegal arrest.[213]

(*f*) *The Offering, Giving, or Receiving of the Bribe.*—At common law, both the giver and the taker of a bribe are guilty of a misdemeanor.[214] And it is a misdemeanor to offer a bribe, though this is an attempt to bribe, rather than bribery.[215] It is also a misdemeanor at common law, in the nature of an attempt, to solicit a bribe, though it may not be given.[216] Some statutes require

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to lay a railroad track along one of the streets of the city is a misdemeanor,—an attempt to bribe,—even though the city council may not have authority to make the grant, or the railroad company the power to avail itself of the benefits thereof, if made. State v. Ellis, supra.

[212] People v. O'Neil, 48 Hun, 36, 109 N. Y. 251.

[213] Moseley v. State, 25 Tex. App. 515.

[214] Per Lord Mansfield in Rex v. Vaughan, 4 Burrows, 2494, 2500.

[215] Rex v. Vaughan, 4 Burrows, 2494; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707.

[216] Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128.

actual giving and receipt of the money or other thing, and an offer merely is not enough. But, under such a statute, it is sufficient if there is a corrupt agreement for payment of money for an act, and the money is paid in pursuance thereof after the act is done.[217] The money or other thing need not be paid or given to the person bribed. It is enough if it be given to another at his instance.[218]

433. Embracery.—It is a misdemeanor, known as "embracery," for any person to attempt, by any means whatever, except by the production of evidence and argument in open court, to influence and instruct any juryman, or to incline him to be more favorable to the one side than to the other, in any judicial proceeding, whether any verdict is given or not, and whether a verdict, if given, is true or false.[219]

Embracery is a misdemeanor at common law, being an offense against public justice, and in most jurisdictions it is expressly punished by statute.[220] It is defined by Black-

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[217] Glover v. State, 109 Ind. 391. Contra, under the Texas statute requiring the gift to precede the act. Hutchinson v. State, 36 Tex. 293.

[218] Com. v. Root, 96 Ky. 533.

[219] Steph. Dig. Crim. Law, art. 128.

[220] 1 Hawk. P. C. c. 85, § 7; 4 Bl. Comm. 140;

stone as "an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like."[221]

434. Misconduct in Office—(a) In General.—A public officer is guilty of a misdemeanor at common law if, from an improper motive, and in the exercise of the duties of his office, or under color of exercising such duties, he does an illegal act, or abuses his discretionary power, or if he commits any fraud or breach of trust affecting the public, or if he willfully neglects to perform his duty without sufficient excuse.

And a person is guilty of a misdemeanor if he unlawfully refuses or omits to take upon himself and serve any public office which he is by law required to accept if duly appointed, unless some other penalty is provided, or there is some custom to the contrary.

(*b*) *Unlawful Acts and Abuse of Power.* —"Every public officer," says Stephen, "commits a misdemeanor who, in the exercise or under color of exercising the duties of his office, does an illegal act, or abuses any discretionary power with which he is in-

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Gibbs v. Dewey, 5 Cow. (N. Y.) 503; State v. Williams, 136 Mo. 293; State v. Brown, 95 N. C. 685; Caruthers v. State, 74 Ala. 406.

[221] 4 Bl. Comm. 140.

vested by law, from an improper motive, the existence of which motive may be inferred either from the nature of the act or from the circumstances of the case. But an illegal exercise of authority, caused by a mistake as to the law, made in good faith, is not a misdemeanor." [222] Thus, it is a misdemeanor for a justice of the peace to refuse licenses to keepers of a public house because of their refusal to vote as directed or desired by him,[223] or to send his servant to the house of correction for being saucy, and giving too much corn to his horses,[224] or for justices of the peace to enter into a corrupt agreement to vote for a certain person as clerk of the court.[225]

(*c*) *Extortion.*—If the illegal act consists in the officer's taking, under color of his office, from any person, any money or valuable thing which is not due from him, or which is not due at the time it is taken, the

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[222] Steph. Dig. Crim. Law, art. 119; Reg. v. Wyat, 1 Salk. 380; Rex v. Bembridge, 3 Doug. 327; Rex v. Borron, 3 Barn. & Ald. 434.

[223] Rex v. Williams, 3 Burrows, 1317.

[224] Rex v. Okey, 8 Mod. 46.

[225] Com. v. Callaghan, 2 Va. Cas. 460, Beale's Cas. 116.

offense is called *"extortion."* [226] Thus, a constable is guilty of extortion if he obtains money from a person who is in his custody under a warrant for an assault, upon color and pretense that he will procure the warrant to be discharged.[227] In most jurisdictions, perhaps in all, the offense is now punished by statute.[228] To constitute extortion at common law, and very generally under the statutes, there must be a corrupt intent. For example, it is not enough to show that unlawful fees were demanded and received, but it must appear that they were demanded and received corruptly, and, according to the better opinion, not under any mistake, either of law or fact.[229] It is also necessary that

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[226] Steph. Dig. Crim. Law, art. 119. And see 1 Hawk. P. C. c. 68, § 1; State v. Pritchard, 107 N. C. 921; Com. v. Bagley, 7 Pick. (Mass.) 279; Williams v. State, 2 Sneed (Tenn.) 160; People v. Whaley, 6 Cow. (N. Y.) 661.

[227] Steph. Dig. Crim. Law, art. 119, illustration 6; 2 Chit. Crim. Law, 282.

[228] See 12 Am. & Eng. Enc. Law (2d Ed.) 576.

[229] State v. Pritchard, 107 N. C. 921; Collier v. State, 55 Ala. 125. Some courts have held that mistake of law is no defense. State v. Dickens, 1 Hayw. (N. C.) 407; Shepard, J., in State v. Pritchard, supra.

the money or other thing shall be demanded and received by the officer under color of his office.[230] The offense may be committed by a *de facto* officer, as well as by an officer *de jure*.[231]

(*d*) *Oppression.*—If the illegal act of the officer consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not being extortion, the offense is called *"oppression."*[232] Thus, as before stated, it is oppression for justices of the peace to refuse licenses to the keepers of public houses because of their refusal to vote a certain way,[233] or for a justice of the peace to send his servant to the house of correction for being saucy, and giving too much corn to his horses,[234] etc. To constitute oppression, there must be an improper motive, and not a *bona fide* mistake as to the law.[235] Op-

[230] Reg. v. Baines, 6 Mod. 192; State v. Pritchard, 107 N. C. 921; Collier v. State, 55 Ala. 125.

[231] Com. v. Saulsbury, 152 Pa. St. 554.

[232] Steph. Dig. Crim. Law, art. 119.

[233] Rex v. Williams, 3 Burrows, 1317.

[234] Rex v. Okey, 8 Mod. 46.

[235] Rex v. Jackson, 1 Term R. 653; Reg. v. Badger, 4 Q. B. 475.

pression by public officers is punished in most states by statute.

(*e*) *Fraud and Breach of Trust.*—It is a misdemeanor for a public officer, in the discharge of the duties of his office, to commit any fraud or breach of trust affecting the public, whether such fraud or. breach of trust would be criminal or not if committed against a private individual.[236] Thus, it is a misdemeanor for an accountant in a public office to fraudulently omit to make certain entries in his accounts, whereby he enables the cashier to retain large sums of money in his own possession, and to appropriate the interest on such sums,[237] or for a public officer to make a contract on behalf of the public, on the condition that he shall have part of the profits.[238]

(*f*) *Neglect of Official Duty.*—It is a misdemeanor for a public officer to willfully neglect to perform any duty which he is bound, either by common law or by statute,

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[236] Steph. Dig. Crim. Law, art. 121.

[237] Rex v. Bembridge, 3 Doug. 332; Steph. Dig. p. 80, illustration 1.

[238] Rex v. Jones, 31 St. Tr. 251; Steph. Dig. p. 80, illustration 2.

to perform, unless the discharge of such duty is attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.[239] Thus, it has been held a misdemeanor for the mayor of a city to refuse or willfully neglect to do the various acts which it is in his power to do, and which a man of ordinary firmness might be expected to do, in order to suppress a riot in the city;[240] for a constable to refuse to arrest a person who commits a felony in his presence,[241] or to raise a hue and cry when a felony has been committed, and he is informed thereof;[242] for a sheriff to refuse to execute a criminal condemned to death;[243] or for a coroner to neglect to take an inquest on a body after notice that it is

[239] Steph. Dig. Crim. Law, art. 122; Crouther's Case, 2 Cro. Eliz. 654, Beale's Cas. 95; People v. Bedell, 2 Hill (N. Y.) 196; State v. Kern, 51 N. J. Law, 259; Robinson v. State, 2 Cold. (Tenn.) 181.

[240] Rex v. Pinney, 5 Car. & P. 254, 3 Barn. & Adol. 947. And see Rex v. Kennett, 5 Car. & P. 282, note.

[241] 2 Hawk. P. C. 129.

[242] Crouther's Case, 2 Cro. Eliz. 654, Beale's Cas. 95.

[243] Rex v. Antrobus, 2 Adol. & E. 798.

lying dead in his jurisdiction.[244] Neglect of duty by public officers is now covered and punished in most jurisdictions by statute.

(*g*) *Refusal to Serve an Office.*—"Everyone commits a misdemeanor who unlawfully refuses or omits to take upon himself and serve any public office which he is by law required to accept if duly appointed, but this article does not extend to cases in which any other penalty is imposed by law for such refusal or neglect, or to any case in which, by law or by custom, any person is permitted to make any composition in place of serving any office." [245]

435. Escape—(a) In General.—An "escape" is where a person who is in lawful custody for any criminal offense, whether it be treason, felony, or misdemeanor, regains his liberty before he is delivered in due course of law. It is an offense on the part of the person in custody, and of the officer in whose custody he is, as stated in the following paragraphs.

(*b*) *Voluntary Permission of Escape by Officer, etc.*—Any person who has a prisoner in his lawful custody, and who knowingly,

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[244] 2 Hale, P. C. 58.

[245] Steph. Dig. Crim. Law, art. 123; Rex v. Bower, 1 Barn. & C. 585.

and with intent to save him from trial or punishment, permits him to regain his liberty otherwise than in due course of law, commits the offense of voluntary escape, and is guilty of treason, felony, or misdemeanor, according to the circumstances. He is guilty of treason if the prisoner was in his custody for, and was guilty of, treason. He becomes an accessary after the fact to the felony if the prisoner was in custody for, and was guilty of, a felony. And he is guilty of a misdemeanor if the prisoner was in custody for, and was guilty of, a misdemeanor.[246] This was the common-law rule, but in many jurisdictions it has been more or less changed by statute. It makes no difference whether the prisoner was in jail or prison, or under a bare arrest in the street, or elsewhere.[247]

(*c*) *Negligent Permission of Escape.*— One who negligently permits the escape of a prisoner is not guilty of so serious an offense as one who knowingly and voluntarily does so. He is guilty of a misdemeanor

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[246] Steph. Crim. Law, art. 143; 1 Russ. Crimes, 583; 4 Bl. Comm. 129, 130; 2 Hawk. P. C. c. 17, § 5; State v. Doud, 7 Comm. 387.

[247] 4 Bl. Comm. 130.

only, whatever may have been the offense for which the prisoner was in custody. The rule is that every one is guilty of a misdemeanor, known as "negligent escape," who, by neglect of any duty, or by ignorance of the law, permits a person in his lawful custody to regain his liberty otherwise than in due course of law.[248] This offense is very generally punished by statute, but it is also an offense at common law.

(*d*) *Liability of Person Escaping.*—Not only are officers and others guilty of an offense in permitting an escape, but the prisoner also commits an offense in escaping. It is a misdemeanor at common law, and very generally under statutes in the different jurisdictions, for any person who is lawfully in custody for a criminal offense to escape from such custody before he is delivered in due course of law.[249] In order that a per-

[248] Steph. Dig. Crim. Law, art. 144; 1 Hale, P. C. 600; 2 Hawk. P. C. c. 19, § 31 et seq; 4 Bl. Comm. 130; Martin v. State, 32 Ark. 126.

[249] Steph. Dig. Crim. Law, art. 152; 1 Hale, P. C. 611; 2 Hawk. P. C. c. 17, § 5; Id. c. 18, § § 9, 10; 4 Bl. Comm. 129; Com. v. Farrell, 5 Allen (Mass.) 131; State v. Brown, 82 N. C. 586; Riley v. State,

son may be guilty of an escape, he must have been arrested, and he must be lawfully in custody.[250]

436. Breaking Prison.—It is a felony or misdemeanor, according to the circumstances, for a person who is lawfully detained on a criminal charge, or under sentence for a crime, to break out of the place in which he is detained, against the will of the person by whom he is detained.[251]

This offense is commonly known as "breach of prison," or "prison breach." It is something more than an escape, because there is a breaking out of custody, and the offense is more serious, and was more severely punished at common law. If the offender was detained on a charge of, or under sentence for, treason or felony, he was guilty of felony. If he was detained under a charge of misdemeanor, he was guilty of a misdemeanor only.[252] To constitute this offense, the

16 Conn. 50; State v. Davis, 14 Nev. 439, 33 Am. Rep. 563.

[250] See Whitehead v. Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672; People v. Ah Teung, 92 Cal. 425. If an arrest is prevented by a party's resistance or avoidance of the officer, there is no escape. Whitehead v. Keyes, supra.

[251] Steph. Dig. Crim. Law, art. 153.

[252] Steph. Dig. Crim. Law, art. 153; 4 Bl. Comm.

prisoner must break out; but the expression "break out" means any actual breaking of the place in which he is confined, whether intentional or not.[253] If a person detained in prison for felony merely climbs over the prison wall and escapes, he is guilty of escape, but not of prison breach. But if loose bricks are arranged on top of the wall, so as to fall if disturbed, and, in climbing over the wall, he accidentally disturbs and throws one of them down, he is guilty of prison breach.[254] To unlock a door or open a window is a breaking.[255] Breach of prison to escape is punished by statute in most states, and is generally, if not always, made a misdemeanor in all cases.[256] As in the case of

130; 1 Hale, P. C. 607; 2 Hawk. P. C. c. 18, § 1; Com. v. Miller, 2 Ashm. (Pa.) 61; People v. Duell, 3 Johns. (N. Y.) 449.

All prison breach was felony at common law, but it was changed, as stated in the text, by an early English statute,—1 Edw. II. See 4 Bl. Comm. 130.

[253] Steph. Dig. Crim. Law, art. 153.

[254] Rex v. Haswell, Russ. & R. 458.

[255] Randall v. State, 53 N. J. Law, 488.

[256] See State v. Brown, 82 N. C. 586.

escape, the imprisonment must be lawful.[257] And it is also necessary that the prisoner shall escape, and not merely break with intent to escape.[258]

437. Rescue.—It is treason, felony, or misdemeanor, according to the circumstances, to rescue a prisoner from one who lawfully has him in custody.

By "rescue" is meant the act of forcibly freeing a person from lawful custody, against the will of those who have him in custody.[259] At common law a person who is guilty of rescue is guilty of a like offense, as is an officer who voluntarily permits a prisoner to escape.[260] He is guilty of treason, felony, or misdemeanor, according to the offense for which the person rescued was in custody.[261] The offense of rescue is now very generally defined and punished by statutes varying

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[257] 2 Hawks. P. C. c. 18, §§ 7, 8; State v. Leach, 7 Conn. 452, 18 Am. Dec. 118.

[258] 2 Hawk. P. C. c. 18, § 12.

[259] Steph. Dig. Crim. Law, art. 145; 1 Russ. Crimes, 597; 4 Bl. Comm. 131; 2 Hawk. P. C. c. 21, § 6.

[260] Ante, § 435(b).

[261] Steph. Dig. Crim. Law, art. 146; 1 Hale, P. C. 606, 607; 1 Russ. Crimes, 597; 4 Bl. Comm. 131; 2 Hawk. P. C. c. 21, § 7.

more or less from the common law.[262] To constitute a rescue, the prisoner must be in lawful custody, either of an officer, or of a private person,[263] and he must escape.[264] And where the prisoner is in the custody of a private person, the rescuer must have notice of the fact that he is in custody.[265]

438. Compounding Offenses.—It is a misdemeanor for a person, for any valuable consideration, to enter into an agreement not to prosecute any person for a felony, or to show favor to any person in any such prosecution.[266]

This offense, called the "compounding of a felony," is very generally punished by statute. It is also indictable as a misdemeanor at common law, because it is an offense against public justice.[267] "To com-

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[262] See Robinson v. State, 82 Ga. 544; Hillian v. State, 50 Ark. 523.

[263] 1 Hale, P. C. 606. Since there must have been an arrest before there can be a rescue, a person who, by interference, prevents an officer from making an arrest, is not guilty of a rescue, but of obstructing an officer. Whitehead v. Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672.

[264] 2 Hawk. P. C. c. 21, § 3.

[265] Steph. Dig. Crim. Law, art. 145; 1 Hale, P. C. 606.

[266] Steph. Dig. Crim. Law, art. 158.

[267] 1 Hawk. P. C. 125; 4 Bl. Comm. 133; Com. v.

pound a crime," it has been said, "is to take any valuable consideration, or any engagement or promise thereof, upon any agreement or understanding, express or implied, to conceal such an offense, or to abstain from any prosecution therefor, or to withhold any evidence thereof."[268] It was originally called "*theft bote,*" and was committed where a person robbed took his goods again, or other amends, upon agreement not to prosecute.[269] It extends now to all felonies. It seems not to be an offense at common law to compound a misdemeanor, but in some states it is made so by statute.

To constitute this offense there must be some agreement or understanding either express or implied, and not merely a concealment of the felony, or a failure to prosecute, without any agreement.[270] Where there is no agreement, the offense is misprision of

Pease, 16 Mass. 91; People v. Buckland, 13 Wend. (N. Y.) 592.

[268] Allen P. Hallett, in 6 Am. & Eng. Enc. Law (2d Ed.) 399.

[269] 4 Bl. Comm. 133.

[270] 1 Hawk. P. C. c. 59, § 7; Brittin v. Chegary, 20 N. J. Law, 625.

felony.[271] Thus, it is not compounding the felony for the owner of stolen goods to take them back, or to take payment or security therefor, without any agreement not to prosecute, though he may not prosecute.[272] It is also necessary that there shall be some valuable consideration for the promise not to prosecute, but the consideration may be a note or other promise, or any other advantage, as well as the payment of money or delivery of property.[273] Conviction of the felon is not a condition precedent to a prosecution for compounding the felony.[274]

439. Misprision of Felony.—One who sees another commit a felony, or knows of its commission, and uses no means to apprehend him, or bring him to justice, or to prevent the felony, is guilty of a misdemeanor known as "misprision of felony."

As was shown in a previous chapter, one who sees another commit a murder or other felony is not guilty of the felony as a prin-

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271 Post, § 439.

272 1 Hawk. P. C. c. 59, § 7. See Flower v. Sadler, 10 Q. B. Div. 572; Rex v. Stone, 4 Car. & P. 379.

273 Com. v. Pease, 16 Mass. 91.

274 People v. Buckland, 13 Wend. (N. Y.) 592.

cipal in the second degree, merely because he takes no steps to prevent the felony, or to apprehend him or bring him to justice.[275] Nor is he guilty as an accessary after the fact to the felony because of his mere neglect to make known the commission of the crime.[276] He is guilty, however, of a misdemeanor,—misprision of felony.[277] To be guilty of misprision only, he must not aid or abet the felony, or receive, relieve, or assist the felon, for in such cases he is himself guilty of the felony, as a principal in the second degree, or accessary before or after the fact.[278]

440. Barratry.—It is a misdemeanor, called "common barratry," or "barretry," to frequently excite and stir up suits and quarrels between individuals, either at law or otherwise.[279]

This is a common-law offense against public justice. It is defined in some states by statute as "the practice of exciting ground-

[275] Ante, § 174.

[276] Ante, § 184.

[277] Steph. Dig. Crim. Law, art. 157; 1 Hale, P. C. 439; 2 Hawk. P. C. c. 29, § 10; 4 Bl. Comm. 121.

[278] Ante, §§ 170 et seq., 181 et seq.

[279] 4 Bl. Comm. 134; Steph. Dig. Crim. Law, art. 141; Com. v. McCulloch, 15 Mass. 227; Com. v. Davis, 11 Pick. (Mass.) 432; State v. Chitty, 1 Bailey (S. C.) 379.

less judicial proceedings."[280] At common law, there must be at least two of such acts, and perhaps three, to make one a *common* barrator.[281] Some statutes expressly require at least three.[282] The acts must be committed with a mean and selfish intent, and not for the *bona fide* purpose of promoting public justice, or enforcing private rights.[283]

441. Maintenance and Champerty.—Maintenance and champerty are misdemeanors at common law:

1. **Maintenance being the act of assisting the plaintiff in any legal proceeding in which the person giving assistance has no valuable interest, or in which he acts from any improper motive.**
2. **And champerty being maintenance in which the motive of the maintainor is an agreement that, if the proceeding succeeds, the subject-matter shall be divided between the plaintiff and the maintainor.[284]**

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[280] Pen. Code N. Y. § 132.

[281] Reg. v. Hannon, 6 Mod. 311; Com. v. Davis, 11 Pick. (Mass.) 432; Com. v. Tubbs, 1 Cush. (Mass.) 3.

[282] See Lucas v. Pico, 55 Cal. 126; Pen. Code N. Y. 134.

[283] 8 Coke, 36b; Com. v. McCulloch, 15 Mass. 227; State v. Chitty, 1 Bailey (S. C.) 379.

[284] Steph. Dig. Crim. Law, art. 141.

These offenses—maintenance and champerty—are both, like barratry, offenses against public justice, and misdemeanors at common law, and are expressly prohibited and punished by statute in many jurisdictions.[285] Both at common law and under the statutes, the party interfering in a suit by another, to be guilty of maintenance or champerty, must have no valuable interest therein, and must act from an improper motive. He is not guilty if he has a real interest, or if he believes in good faith that he has.[286] Relatives, or husband and wife, or perhaps master and servant, may assist each other, if they act from no improper motive, without being guilty of maintenance.[287] And a person may assist another from charitable motives.[288] In some states, the com-

[285] Steph. Dig. Crim. Law, art. 141; 4 Bl. Comm. 135; Martin v. Clarke, 8 R. I. 389, 401, 5 Am. Rep. 586; Thompson v. Reynolds, 73 Ill. 11.

[286] 1 Hawk. P. C. c. 83, § 18; Findon v. Parker, 11 Mees. & W. 675; Gilman v. Jones, 87 Ala. 698; Davies v. Stowell, 78 Wis. 336.

[287] 1 Hawk. P. C. c. 83, §§ 20-24; 4 Bl. Comm. 135; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 309; Beard v. Puett, 105 Ind. 68.

[288] 4 Bl. Comm. 135; State v. Chitty, 1 Bailey (S.

mon-law doctrine as to these offenses has been greatly modified, or is not recognized at all.

442. Disobedience to Lawful Orders—(a) Disobedience to a Statute.—It is a misdemeanor to willfully do or omit to do an act concerning the public which is forbidden or commanded by a statute, unless some other exclusive penalty is provided.

"Every one commits a misdemeanor who willfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public, or any part of the public, unless it appears from the statute that it was the intention of the legislature to provide some other penalty for such disobedience."[289] This principle would apply to a willful omission to repair a public highway, in obedience to a statute.[290]

C.) 379, 401; Quigley v. Thompson, 53 Ind. 317; Graham v. McReynolds, 90 Tenn. 703.

[289] Steph. Dig. Crim. Law, art. 124; Rex v. Wright, 1 Burrows, 543; Rex v. Harris, 4 Term R. 205; People v. Stevens, 13 Wend. (N. Y.) 341; Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267.

[290] See Reg. v. Bamber, 5 Q. B. 279, Beale's Cas.

(b) Disobedience to Lawful Orders of Court, etc.—It is a misdemeanor to willfully disobey any order, warrant, or command duly made, issued, or given by any court, officer, or person acting in any public capacity and duly authorized in that behalf, unless some other exclusive penalty or mode of proceeding is provided.[291]

Thus, if no other penalty or mode of proceeding is prescribed, it is a misdemeanor, and indictable at common law, for a man to refuse to pay over money for the support of his bastard child, in obedience to a lawful order of a competent court,[292] or for a person to refuse to assist a peace officer to make an arrest, suppress a riot or affray, or execute any other duty, when lawfully called upon by the officer for assistance.[293]

443. Libel and Slander of Judicial Officers.—To libel or slander a judicial officer in his office is a misdemeanor at common law.

As was shown in another section, to merely

356; Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267.

[291] Steph. Dig. Crim. Law, art. 125; Jones' Case, 2 Mood. C. C. 171; Rex v. Dale, Dears. C. C. 37; Reg. v. Sherlock, L. R. 1. C. C. 20, 10 Cox, C. C. 170; Reg. v. Ferrall, 2 Den. C. C. 51.

[292] Reg. Ferrall, 2 Den. C. C. 51.

[293] Reg. v. Sherlock, L. R. 1 C. C. 20, 10 Cox, C. C. 170.

speak defamatory words of a private individual is not an indictable offense at common law, though it is otherwise if a libel is maliciously published by writing, etc.[294] It is a misdemeanor at common law, however, to even speak defamatory words of a judge or justice of the peace in the execution of his office.[295] "All actions for slandering a justice in his office may be turned into indictments." [296]

444. Offenses in Connection with Elections.—Frauds and obstruction in connection with public elections are misdemeanors at common law.

In most jurisdictions, if not in all, statutes have been enacted punishing various acts in connection with public elections, as fraudulent registration, fraudulent and illegal voting, misconduct of election officers, bribery of voters, intimidation of voters, etc.,[297] and, as the statutes cover almost every

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[294] Ante, § 428.

[295] Anon., Comb. 46, Beale's Cas. 96, where an indictment was sustained for speaking of a justice of the peace as a "buffle-headed fellow."

[296] Wright, C. J., in Anon., Comb. 46, Beale's Cas. 96.

[297] See the various state statutes governing elections.

wrong in connection with elections, few cases have arisen of prosecutions at common law. There are some such cases, however, and it cannot be doubted that frauds, bribery, intimidation of voters, wrongful interference, and other acts in connection with public elections which directly tend to prevent a pure and proper election, are indictable at common law, if not covered by statute.[298] It has been held a misdemeanor at common law to fraudulently and illegally vote twice at an election,[299] or to disturb a town meeting to elect officers, in order to prevent a legal election.[300] And, in a comparatively late Pennsylvania case, a fraudulent deposit of illegal ballots, and a false and fraudulent count and return of votes, were held indictable as a misdemeanor at common law. The court said: "We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect

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[298] Com v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808; Com. v. Silsbee, 9 Mass. 417, Beale's Cas. 111.

[299] Com. v. Silsbee, 9 Mass. 417, Beale's Cas. 111.

[300] Com. v. Hoxey, 16 Mass. 385.

the public police and economy."[301] Bribery of voters is elsewhere considered.[302]

III. OFFENSES AFFECTING THE PUBLIC SAFETY, HEALTH, COMFORT, ETC.

445. In General.—Any act injuriously affecting or endangering the safety, health, or comfort of the community at large is a public nuisance, and a misdemeanor at common law.

446. Public and Private Nuisances.

As was explained shortly in another place, a nuisance which affects an individual only, or a few individuals, is a mere private wrong, and not a crime. It is a private nuisance, as distinguished from a public nuisance, and is no ground for indictment.[303] On the other hand, a nuisance which, by being maintained in or near a public highway, or in a thickly-settled community, injuriously affects the whole community, is a common or public nuisance, and is a misdemeanor at common law.[304] For example,

[301] Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808.

[302] Ante, § 432b.

[303] Rex v. Lloyd, 4 Esp. 200; Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, Beale's Cas. 119; Com. v. Webb, 6 Rand. (Va.) 726; Com. v. Faris, 5 Rand. (Va.) 691; People v. Jackson, 7 Mich. 432.

[304] Rex v. White, 1 Burrows, 333; Rex v. Bur-

it is not a public nuisance, subject to indictment, for a man to fire his gun near a house in which there is a sick person, to the detriment of such person's health,[305] but to do such acts in the streets of a city would be a public nuisance. It would not be a public nuisance to expose a single person to a contagious disease, but it is a public nuisance to expose a person having a contagious disease in the public streets, and so endanger the health of the whole community.[306]

447. Nuisances Affecting the Public Health and Safety.

It may undoubtedly be laid down as a general proposition that all unjustifiable acts[307] which endanger the safety or health

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nett, 4 Maule & S. 272, Beale's Cas. 104; Reg. v. Henson, Dears. C. C. 24; Reg. v. Lister, Dears. & B. C. C. 209; Com. v. Webb, 6 Rand. (Va.) 726; and other cases more specifically cited in the notes following.

[305] Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, Beale's Cas. 119. It may be punishable as an act of wanton and malicious mischief. Ante, § 388.

[306] Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104.

[307] As to justification, see ante, § 77; post, § 456.

of the community at large are public nuisances and misdemeanors at common law.[308] Individuals who suffer a special damage therefrom may maintain an action for redress, but the state may also proceed against the wrongdoer by indictment. Thus, it is a public nuisance, and therefore a misdemeanor, to expose persons or animals infected with the smallpox, or any other contagious disease, in the public streets, and thus endanger the public health;[309] to deposit or keep powder, naptha, or other explosives in such a place as to endanger the life and safety of the public;[310] to shoot off fire arms, or do blasting, in such a way as to endanger the lives of persons living or passing in the neighborhood;[311] to set spring guns in such

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[308] Anon, 12 Mod. 342, Beale's Cas. 843; Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104; and cases cited in the notes following.

[309] Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104; Rex v. Vantandillo, 4 Maule & S. 73; Reg. v. Henson, Dears. C. C. 24.

[310] Anon., 12 Mod. 342, Beale's Cas. 843; Reg. v. Lister, Dears. & B. C. C. 209; Bradley v. People, 56 Barb. (N. Y.) 72; Myers v. Malcolm, 6 Hill (N. Y.) 292, 41 Am. Dec. 744.

[311] Rex v. Moore, 3 Barn. & Adol. 184; Reg. v. Mutters, Leigh & C. 491, 10 Cox, C. C. 6; Hunter v.

a way as to endanger persons passing in the street;[312] to sell or expose for sale unwholesome provisions, or water, etc.;[313] or to race horses without necessity on a public highway, to the danger of the public.[314] To disobey the orders of the public authorities with respect to the performance of quarantine regulations is an indictable offense at common law.[315]

Statutes.—In all of the states statutes have been enacted by the legislatures punishing as nuisances various acts which are deemed to be detrimental to the public health and safety. Among these may be mentioned statutes regulating the sale and keeping of poisons, explosives, etc., statutes containing quarantine regulations, and providing for the care and isolation of persons suffering from contagious diseases, statutes punishing

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Farren, 127 Mass. 481, 34 Am. Rep. 423. And see State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[312] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[313] State v. Smith, 3 Hawks (N. C.) 378; State v. Lafferty, Tappan (Ohio) 113; State v. Snyder, 44 Mo. App. 429; Stein v. State, 37 Ala. 123.

[314] State v. Battery, 6 Baxt. (Tenn.) 545.

[315] Rex v. Harris, 2 Leach, C. C. 549, 4 Term R. 202.

the sale or importation of diseased cattle, etc., and statutes regulating the keeping and care of dairies, and the sale of dairy products, and the like. The enactment of such statutes is undoubtedly within the power of the legislatures, and they have repeatedly been upheld as constitutional.[316] The necessity for a criminal intent to sustain a prosecution under these statutes is elsewhere considered.[317] Whenever the legislature declares an act to be a public nuisance, a person doing the act is liable to indictment.[318]

448. Nuisances Affecting the Public Comfort — In General.

Acts may also amount to indictable public nuisances because they affect the comfort of the community at large by reason of noise, dust, smoke, noisome smells, etc. Thus, it has been held a public nuisance to erect buildings near the highway and dwellings, and make acid spirit of sulphur, so that the air is impregnated with noisome and offensive stinks, to the common nuisance of all persons passing and dwelling in the neigh-

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[316] Ante, §§ 33, 37, et seq.

[317] Ante, §§ 56, 70, et seq.

[318] Reg. v. Crawshaw, Bell, C. C. 303.

borhood.[319] The same is true of other offensive trades and occupations in thickly settled communities, as slaughter-houses, pig pens, breweries, soap factories, boiler factories, tallow factories, brick kilns, and the like.[320] To support an indictment for a nuisance it is not necessary that the smells produced by it shall be injurious to the health. It is sufficient if they are offensive to the senses.[321] And, as we have seen, a thing may be a nuisance because of smoke,

[319] Rex v. White, 1 Burrows, 333.

[320] Rex v. Watts, 2 Car. & P. 486; Rex v. Cross, 2 Car. & P. 483, Beale's Cas. 844; Rex v. Neil, 2 Car. & P. 485; Rex v. Watts, Moody & M. 281; Reg. v. Wigg, 2 Ld. Raym. 1163; Rex v. Medley, 6 Car. & P. 292; Com. v. Mann, 4 Gray (Mass.) 213; Ellis v. State, 7 Blackf. (Ind.) 534; Dennis v. State, 91 Ind. 291; Com. v. Miller, 139 Pa. St. 77, 23 Am. St. Rep. 170, Beale's Cas. 849; People v. Detroit White Lead Works, 82 Mich. 471, Beale's Cas. 851; Seacord v. People, 121 Ill. 623; Faucher v. Grass, 60 Iowa, 505; Ray v. Lynes, 10 Ala. 63; Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; Com. v. Perry, 139 Mass. 198; Allen v. State, 34 Tex. 230; Howard v. Lee, 3 Sandf. (N. Y.) 281; Coe v. Schultz, 47 Barb. (N. Y.) 64; Com. v. Upton, 6 Gray (Mass.) 473; State v. Wetherall, 5 Harr. (Del.) 487; State v. Payson, 37 Me. 361.

[321] Rex v. Neil, 2 Car. & P. 485; and other cases above cited.

dust, and noise, as well as because of noisome smells.[322]

In all cases, the thing complained of must injuriously affect the community at large, so as to constitute a public nuisance. If it affects a single individual only, or two or three particular individuals only, it is a private, as distinguished from a public, nuisance, and is not an indictable offense.[323] It is also necessary, in determining whether a manufactory or other building is a common nuisance, to consider all the circumstances, including the character of the neighborhood in which it is situated, the presence of other manufactories, etc. In other words, "the character of the business complained of must be determined in view of its own peculiar location and surroundings, and not by the application of any abstract principle." [324]

[322] Com. v. Harris, 101 Mass. 29; Faucher v. Grass, 60 Iowa, 505; and other cases above cited.

[323] Rex v. Lloyd, 4 Esp. 200, per Lord Ellenborough. See Ray v. Lynes, 10 Ala. 63; Faucher v. Grass, 60 Iowa, 505; State v. Board of Health, 16 Mo. App. 8.

[324] Com. v. Miller, 139 Pa. St. 77, 23 Am. St. Rep. 170, Beale's Cas. 849.

449. Disorderly Conduct.

(*a*) *In General.*—Conduct of an individual may amount to a public nuisance if it is of such a disorderly character, and in such a place, that it annoys and disturbs the peace and quiet of the community, though, except for such effect, there would be nothing criminal, or even wrong, in the conduct. Such is the case where the whole community is disturbed and annoyed by loud crying out or singing, or other noisy conduct in the public streets, or other public places,[325] or by blasphemy,[326] or public profane cursing or swearing,[327] public drunkenness,[328] indecent exposure of the person,[329] and other acts of public indecency or immorality.[330]

(*b*) *A common scold*—i. e., a woman

[325] Rex v. Smith, 2 Strange, 704, Beale's Cas. 844; Rex v. Moore, 3 Barn. & Adol. 184; Hall's Case, Vent. 169; Beale's Cas. 842; Com. v. Harris, 101 Mass. 29; Com. v. Oaks, 113 Mass. 8; Com. v. Spratt, 14 Phila. (Pa.) 365.

[326] Post, § 471.

[327] Post, § 470; State v. Graham, 3 Sneed (Tenn.) 134; State v. Powell, 70 N. C. 67; State v. Archibald, 59 Vt. 548, 59 Am. Rep. 755.

[328] Post, § 472.

[329] Post, § 469.

[330] Post, § 462 et seq.

who by habitual scolding disturbs the peace and comfort of the neighborhood—is a public nuisance, and indictable at common law.[331]

(*c*) *Eavesdroppers*, defined by Blackstone to be persons who "listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales," are a public nuisance at common law.[332]

(*d*) *Exciting public alarm*, and disturbing the feeling of public security, by false rumors and the like, is also indictable as a nuisance at common law.[333]

450. Disorderly Houses.

A saloon or other place which is permitted to be the resort of idle and dissolute per-

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[331] 2 Hawk. P. C. c. 75, § 14; 4 Bl. Comm. 168; James v. Com., 12 Serg. & R. (Pa.) 236; Com. v. Mohn, 52 Pa. St. 243.

[332] 4 Bl. Comm. 168; State v. Williams, 2 Overt. (Tenn.) 108; Com. v. Lovett, 4 Clark (Pa.) 5, 6 Pa. Law J. 226. See Pen. Code N. Y. § 436.

[333] Com. v. Cassidy, 6 Phila. (Pa.) 82, in which it was held a public nuisance to distribute handbills in a city, describing a black woman, and falsely declaring her to be a stealer of children, and to thereby alarm and disturb the community.

sons, and in which they are permitted to carouse and make loud noises, to the disturbance and annoyance of the community, is a disorderly house, and is therefore a public nuisance and misdemeanor at common law.[334] Bawdy houses and common gaming houses are disorderly houses and nuisances at common law.[335]

451. Sunday Work, Games, Sports, etc.—In many states, statutes have been enacted prohibiting and punishing work and business on Sunday, except in cases of necessity or charity, and public games, sports, exhibitions, etc.

It is certainly a nuisance at common law to disturb public rest and quiet on Sunday by unnecessary, conspicuous and noisy action,[336] but work and games or sports which do not disturb the public rest and quiet, are not criminal offenses unless they are made so by some statute.[337] In England, Sabbath

[334] State v. Bertheol, 6 Blackf. (Ind.) 474; State v. Buckley, 5 Harr. (Del.) 508; ante, § 427.

[335] Post, §§ 465, 466.

[336] 2 Whart. Crim. Law, § 1431; Com. v. Jeandell, 2 Grant (Pa.) 506; Lindenmuller v. People, 33 Barb. (N. Y.) 548.

[337] Rex v. Brotherton, 2 Strange, 702; State v. Brooksbank, 6 Ired. (N. C.) 73; Eden v. People, Ill. 296; Sayles v. Smith, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117.

breaking has been punished by statute since an early day, and there are similar statutes in this country. The effect of most of these statutes is to prohibit and punish the exposing of any goods for sale on Sunday, with certain exceptions, or the doing of any work on that day, except works of necessity or charity. The English statute of 29 Car. II. c. 7, was to this effect, and has been very generally followed by us. In some jurisdictions, the statutes go further than this, and specifically prohibit (1) all labor except works of necessity or charity; (2) all shooting, hunting, fishing, playing, horse racing, gaming, or other public sports, exercises, or shows; (3) all noise disturbing the peace of the day; (4) all trades, manufactures, and mechanical employments, except when they are works of necessity; and (5) all manner of public selling or offering for sale of any property, with the exception of articles of food up to certain hours, the furnishing of meals under certain conditions, and the sale of prepared tobacco, fruits, confectionery, newspapers, drugs, medicines, etc.[338] In

[338] See Pen. Code Minn. §§ 222-231.

some states, by express provision of the statute, it is a defense to a prosecution for labor on Sunday that the accused observes another day, and does not work on such day.[339]

Validity of Statutes.—These statutes have been upheld as constitutional against attacks on the ground that they were an unconstitutional interference with religious liberty. They are not based upon religious grounds, but on the ground that public policy requires at least one day of rest in each week to be set apart, and are clearly within the power of the legislatures.[340]

Exception of "Works of Necessity or Charity."—It has been said that the exception of "works of necessity or charity" comprehends "all acts which it is morally fit and proper should be done" on Sunday,[341]

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[339] Pen. Code Minn. § 226. In the absence of such a provision, it is no defense. Specht v. Com., 8 Pa. St. 312, 49 Am. Dec. 518; ante, § 65.

[340] Bloom v. Richards, 2 Ohio St. 391; Scales v. State, 47 Ark. 476, 58 Am. Rep. 768; Foltz v. State, 33 Ind. 215; Lindenmuller v. People, 33 Barb. (N. Y.) 548; Specht v. Com., 8 Pa. St. 312, 49 Am. Dec. 518; State v. Baltimore & O. R. Co., 24 W. Va. 783; State v. Court of Common Pleas, 36 N. J. Law, 72, 13 Am. Rep. 422.

[341] Flagg v. Inhabitants of Millbury, 4 Cush.

but this test is too indefinite for practical application. The question must be considered with reference to particular acts. The exception, it was said in a Massachusetts case, unquestionably includes acts necessary or proper to save life, or to prevent or relieve suffering, and this in the case of animals, as well as men; to prepare needful food for man or beast; or to save property in the case of fire, flood, tempest, or other "*unusual*" peril.[342] It is well settled, however, that it is no excuse for work on Sunday to show merely that it was more convenient or profitable to do it then than it would have been to defer or omit it.[343]

(Mass.) 243. See, also, Johnston v. People, 31 Ill. 469; Morris v. State, 31 Ind. 189.

[342] Com. v. Sampson, 97 Mass. 407. And see Morris v. State, 31 Ind. 189.

[343] For this reason, in Com. v. Sampson, 97 Mass. 407, it was held that gathering seaweed on the beach on Sunday was not a work of necessity, though it would probably have floated away if not then gathered. "If," said Judge Hoar, "a vessel had been wrecked upon the beach, it would have been lawful to work on Sunday for the preservation of property which might be lost by delay. But if the fish in the bay or the birds on the shore happened to be uncommonly abundant on

452. Obstructing Highways.

Any unlawful obstruction of a public street, road, or other highway, whether by the unauthorized erection of bridges, buildings, fences, railways, or other structures, or by turning water thereon, or by tearing up the same, or otherwise, is an interference with the right of the public to pass along the same, and is indictable as a common or public nuisance at common law.[344] An in-

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the Lord's Day, it is equally clear that it would have furnished no excuse for fishing or shooting on that day." In another Massachusetts case it was held that the fact that crops in a field were suffering from want of hoeing did not make the hoeing of them on Sunday a work of necessity. Com. v. Josselyn, 97 Mass. 411. See, also, Johnston v. Com., 22 Pa. St. 102.

[344] Hall's Case, Vent. 169, Beale's Cas. 842; Rex v. Sarmon, 1 Burrows, 516; Rex v. Cross, 3 Camp. 224; Rex v. Jones, 3 Camp. 230; Reg. v. Longton Gas Co., 2 El. & El. 651, 8 Cox, C. C. 317; Rex v. Carlisle, 6 Car. & P. 637; Rex v. West Riding of Yorkshire, 2 East, 342; Rex v. Morris, 1 Barn. & Adol. 441; Rex v. Gregory, 5 Barn. & Adol. 555, 2 Nev. & M. 478; Com. v. Reed, 34 Pa. St. 275, 75 Am. Dec. 661; Boyer v. State, 16 Ind. 451.

Telegraph posts are an obstruction and nuisance. Reg. v. United Kingdom E. T. Co., 3 Fost. & F. 73, 9 Cox, C. C. 174; Com. v. Reed, 34 Pa. St.

dictment will lie for setting a person in the footway of a public street to deliver handbills, if the footway is greatly obstructed,[345] or for keeping stage coaches and trucks standing in the street beyond such time as may be reasonably necessary,[346] or for causing a crowd to collect by acrobatic performances, exhibiting effigies in a window, or otherwise, if the street is thereby obstructed.[347] Of course valid public authority to obstruct a highway is a defense.[348]

453. Failure to Repair Highways.

It is a misdemeanor for a corporation or individual to fail to repair a highway, or suffer it to be out of repair when required by law to keep it in repair, unless there is sufficient excuse for such neglect.[349]

275, 75 Am. Dec. 661. But see Com. v. City of Boston, 97 Mass. 555.

[345] Rex v. Sarmon, 1 Burrows, 516.

[346] Rex v. Cross, 3 Camp. 224; Rex v. Russell, 6 East, 427.

[347] Rex v. Carlile, 6 Car. & P. 637; Hall's Case, Vent. 169, Beale's Cas. 842; Barker v. Com., 19 Pa. St. 412.

[348] Post, § 456.

[349] Rex v. Inhabitants of Stretford, 2 Ld. Raym. 1169; State v. Godwinsville, etc., Road Co., 49 N. J. Law, 266, 60 Am. Rep. 611; State v. King,

454. Obstructing Navigable Waters.

It is also a public nuisance, and a misdemeanor at common law, to place an unauthorized obstruction, as a bridge wharf, posts, and the like, in navigable rivers or other navigable waters, or to otherwise obstruct the same.[350]

455. Pollution of Waters and Watercourses.

It is a public nuisance and misdemeanor to pollute a spring or watercourse, as by urinating in a spring, throwing dead carcasses into a spring or stream, or putting other injurious or noxious substances therein, if the spring or watercourse is used by the public, so that the public health or comfort is thereby affected.[351]

456. Justification and Excuse.

(*a*) *Public Necessity and Authority.*—Public necessity and authority may justify

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3 Ired. (N. C.) 411; Simpson v. State, 10 Yerg. (Tenn.) 525.

[350] Reg. v. Stephens, L. R. 1 Q. B. 702, Beale's Cas. 845; Rex v. Ward, 4 Adol. & El. 384; Respublica v. Caldwell, 1 Dall. (Pa.) 150, Beale's Cas. 177; State v. Narrows Island Club, 100 N. C. 477; People v. Vanderbilt, 28 N. Y. 396.

[351] State v. Taylor, 29 Ind. 517; Board of Health of New Brighton v. Casey, 3 N. Y. Supp. 399.

an act, and render it lawful, when, but for such necessity and authority, it would amount to a public nuisance. Thus, as was shown in a previous section, if, in order to prevent the spread of a contagious disease, inconvenience is caused to persons by the smoke and noxious vapors arising from the burning of infected clothing and bedding, and if the burning is done by public authority or sanction, in good faith and for the public safety, and such means are employed as are usually resorted to and approved by medical science in such cases, and if done with reasonable care and regard for the safety of others, there is no indictable nuisance.[352]

(*b*) *Legislative Authority.*—An act done by a person, though it may affect the safety, health, or comfort of the community, does not render him liable to indictment, where there is a valid act of the legislature, or valid municipal ordinance, expressly authorizing him to do the act in the way in which it is done.[353] But legislative authority to do an

[352] State v. Mayor, etc., of Knoxville, 12 Lea (Tenn.) 146, Beale's Cas. 313.

[353] Berry v. People, 36 Ill. 425; Overby v. State, 18 Fla. 178.

act is not to be construed, where any other construction is reasonable, as permitting the doing of the act in such a way as to constitute a public nuisance. A license from the state or from a municipality may render lawful the keeping of a place which would be a nuisance at common law in the absence of a license;[354] but a license is no justification if a place is kept in a disorderly or noisome way, that is not clearly authorized.[355] Statutory authority to construct a railroad in or across a public street or highway, if valid, will prevent the obstruction from being a nuisance, if the provisions of the statute are complied with, but not otherwise.[356] When statutory powers are conferred under circumstances in which they may be exercised with a result not causing any nuisance, and

[354] Berry v. People, supra; Overby v. State, supra.

[355] U. S. v. Coulter, 1 Cranch, C. C. 203, Fed. Cas. No. 14,875; State v. Mullikin, 8 Blackf. (Ind.) 260; Berry v. People, 1 N. Y. Cr. R. 43, 57, 77 N. Y. 588; State v. Foley, 45 N. H. 466. And see Rex v. Cross, 2 Car. & P. 483, Beale's Cas. 844.

[356] Reg. v. Scott, 3 Q. B. 543, 2 Gale & D. 729; Rex v. Pease, 4 Barn. & Adol. 30.

new and unforeseen circumstances arise, which render the exercise of them impracticable without causing a nuisance, the persons so exercising them are liable to indictment.[357]

(*c*) *Benefit to the Community.*— If the act of a person, or his use of property, amounts to a public nuisance under the rules and principles explained in the preceding sections, it is no defense for him to say that the public may be or is in fact benefited thereby.[358] Thus, on an indictment for a nuisance in erecting a wharf on public property, it is no defense to show that such erection has been beneficial to the public.[359] And, on an indictment for maintaining an offensive business in a thickly-settled community, it is no defense to show that the busi-

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[357] Reg. v. Bradford Nav. Co., 6 Best & S. 631, 11 Jur. (N. S.) 769.

[358] Respublica v. Caldwell, 1 Dall. (Pa.) 150, Beale's Cas. 177; People v. Detroit White Lead Works, 82 Mich. 471, Beale's Cas. 851; State v. Kaster, 35 Iowa, 221; Seacord v. People, 121 Ill. 623; Rex v. Ward, 4 Adol. & El. 384 (overruling Rex v. Russell, 6 Barn. & C. 566).

[359] Respublica v. Caldwell, 1 Dall. (Pa.) 150, Beale's Cas. 177.

ness is useful or necessary, or that it contributes to the wealth or prosperity of the community.[360]

(*d*) *Acquiescence by the Public.*—According to the better opinion, long acquiescence by the public in conditions may prevent or bar an indictment for nuisance based upon such conditions. Thus, it was held in an English case, that an acquiescence for fifty years by the neighborhood prevented an indictment for continuing a noxious trade.[361] It was also held that an indictment would not lie for setting up a noxious manufactory in a neighborhood in which other offensive trades had long been borne with and acquiesced in, where the inconvenience to the public was not greatly increased.[362] A man carrying on a noxious business in a place where it has been long established is

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[360] People v. Detroit White Lead Works, 82 Mich. 471, Beale's Cas. 851.

[361] Rex v. Neville, Peake, 93, per Lord Kenyon. But see Ashbrook v. Com., 1 Bush (Ky.) 139, 89 Am. Dec. 616; Anon., 12 Mod. 342, Beale's Cas. 843.

[362] Rex v. Neville, Peake, 91, per Lord Kenyon. See, also, Com. v. Miller, 139 Pa. St. 77, 23 Am. St. Rep. 170, Beale's Cas. 849.

indictable for a nuisance if the mischief is materially increased by a change in the manner or extent of carrying it on; but if the business is increased, with no additional mischief, by adoption of a better mode of carrying it on, an indictment will not lie.[363]

(*e*) *Things not Nuisances when Erected.* —Whether an indictment will lie where the thing complained of was not a nuisance when first erected, but became so afterwards, is not clearly settled. It has been held in some jurisdictions that if a person sets up a noxious trade remote from habitations and public roads, and, after that, new houses are built and new roads constructed near it, he may continue his trade, although it may be a nuisance to persons living in such houses, or passing along such roads.[364] Other courts have taken a contrary view, and have held that when a business becomes a nuisance by reason of residences being erected around it and roads or streets constructed, "it must

[363] Rex v. Watts, Moody & M. 281, per Lord Tenderden.

[364] Anon., 12 Mod. 342, Beale's Cas. 843; Rex v. Cross, 2 Car. & P. 483; Ellis v. State, 7 Blackf. (Ind.) 534.

give way to the rights of the public, and the owner thereof must either devise some means to avoid the nuisance, or must remove or cease the business." [365] He certainly cannot change the manner or extent of carrying on the business, so as to increase the mischief and injury.[366]

IV. OFFENSES AGAINST GOD AND RELIGION.

457. In General.—In this country, no act is a crime merely because it is contrary to the doctrines of the Christian religion, or any other religion.

In England, various acts were punished, at first in the ecclesiastical courts, and later, by statutes, in the civil courts, as offenses against God, the Christian religion, and the established church, and some acts were punished at common law. Among these were apostacy, or a total renunciation of Christianity by embracing either a false religion, or no religion at all, after having once professed Christianity; [367] heresy, which con-

[365] People v. Detroit White Lead Works, 82 Mich. 471, Beale's Cas. 851; Taylor v. People, 6 Park. Cr. R. (N. Y.) 347; Com. v. Upton, 6 Gray (Mass.) 473.

[366] Rex v. Watts, Moody & M. 281.

[367] 9 & 10 Wm. III. c. 32; 4 Bl. Comm. 43.

sists, not in a total denial of Christianity, but in a denial of some of its essential doctrines, publicly and obstinately avowed;[368] offenses against the established church, by reviling its ordinances, or failure to conform to its worship;[369] blasphemy;[370] profane swearing and cursing;[371] witchcraft;[372] religious impostures, such as falsely pretending an extraordinary commission from heaven, and terrifying and abusing the people with false denunciations of judgments;[373] simony, or the corrupt presentation of any one to an ecclesiastical benifice for gift or reward;[374] Sabbath breaking;[375] drunkenness;[376] and open and notorious lewdness.[377]

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[368] 1 Hale, P. C. 384; 2 Hen. IV. c. 15; 2 Hen. V. c. 7; 31 Hen. VIII. c. 14; 4 Bl. Comm. 44-49.

[369] 4 Bl. Comm. 50-59; 1 Edw. VI. c. 1; 1 Eliz. c. 1; and other statutes mentioned by Blackstone.

[370] 4 Bl. Comm. 59. See post, § 471.

[371] 4 Bl. Comm. 60. See post, § 470.

[372] 4 Bl. Comm. 60. This was at one time punished in New England with death, as it was in England.

[373] 4 Bl. Comm. 62.

[374] 4 Bl. Comm. 62.

[375] 4 Bl. Comm. 63. See ante, § 451.

[376] 4 Bl. Comm. 64. See post, § 472.

[377] 4 Bl. Comm. 65. See post, § 462 et seq.

In this country there is no established church, as in England, and no act is a crime *merely because* it offends against any church, or against God, or against the doctrines of any religion. Some of the acts above mentioned, if committed under such circumstances as to constitute a public nuisance, are indictable in this country as misdemeanors at common law, but this is because they annoy the community or shock its sense of morality and decency, or tend to corrupt the public morals, and not merely because the act is forbidden by God, or is contrary to the doctrines of Christianity, or of any church. Blasphemy, profane swearing and cursing, drunkenness, and lewdness are all misdemeanors at common law if committed openly and notoriously,[378] but, as a rule, it is otherwise if they are committed in private. To commit fornication in private, even when it is accompanied by seduction, or to get drunk in one's own house, is no offense at all at common law, though clearly an offense against God and religion.[379] To work on

[378] Post, §§ 463-472.

[379] Post, §§ 462, 472.

Sunday is a violation of God's command, but it is not a crime unless the work is done in such a way as to disturb the public rest, or unless it is expressly prohibited by statute.[380] It is almost needless to say that there are no such crimes in this country as apostacy, heresy, nonconformity to the worship of a church, etc. The constitution of the United States expressly declares that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," [381] and the state constitutions contain similar limitations on the power of the state legislatures.

Christianity as a Part of the Common Law.—It has been said in a number of cases that Christianity is a part of the common law,[382] but from what is said above it is clear that this is true only in a very limited sense. The fact that most people in this country, as in England, are Christians, makes certain

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[380] Ante, § 451.

[381] Const. U. S. Amend. art. 1.

[382] 4 Bl. Comm. 69; Taylor's Case, 1 Vent. 293, Beale's Cas. 96; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Updegraph v. Com., 11 Serg. & R. (Pa.) 394.

acts, like blasphemy and open and notorious lewdness, offensive, so as to render them public nuisances, and for this reason indictable at common law; but, as stated above, no act is punished at common law in this country *merely* because it is contrary to the Christian religion. Nor, in view of our constitutions, could an act be punished for this reason alone.[383] It must be conceded, therefore, that Christianity is not, in any proper sense, a part of our common law.

V. OFFENSES AGAINST MORALITY AND DECENCY.

458. In General.—Any act which directly tends to corrupt the public morals, or which shocks the public sense of morality and decency, is a nuisance and misdemeanor at common law.

As was stated in a previous section,[384] "immorality" and "crime" are by no means convertible terms. The common law does not undertake to punish a man for his acts *merely* because they are immoral. There must be something more than this. There must be some injury or prejudice to the com-

[383] Const. U. S. Amend. 1. See Specht v. Com., 8 Pa. St. 312, 49 Am. Dec. 518. See ante, § 451, note 340, and cases there cited.

[384] Ante, § 28.

munity at large. A man may be guilty of fornication or adultery in private, or be otherwise guilty of the grossest immorality in his private life, without being amenable to the criminal law, unless his conduct is covered by some penal statute.[385]

Public immorality or indecency, however, stands upon a different ground. Because of its manifest tendency to corrupt the morals of the community, or to shock the public sense of morality and decency, public immorality and indecency is a common nuisance and a misdemeanor at common law. It may therefore be laid down as a general rule, as stated above, that any act which has a direct tendency to corrupt the public morals, or which tends to shock the public sense of morality and decency, is a misdemeanor, whether covered by any statute or not.[386]

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[385] Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; State v. Brunson, 2 Bailey (S. C.) 149; Delany v. People, 10 Mich. 241; State v. Calley, 104 N. C. 858, 17 Am. St. Rep. 704; People v. Buchanan, 1 Idaho, 681.

[386] Rex v. Delaval, 3 Burrows, 1434, Beale's Cas. 101; Rex v. Curl, 2 Strange, 788; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632, Beale's Cas. 113; Kanavan's Case, 1 Me. 226, Beale's Cas.

For this reason it is a misdemeanor to keep a common bawdy house or a common gaming house, to be guilty of open and notorious lewdness, to indecently expose the person in public, to publish obscene literature or pictures, to be guilty of blasphemy, profanity, or drunkenness in public, to give an obscene or indecent exhibition, etc. In all jurisdictions, statutes have been enacted specifically punishing various acts of immorality and indecency.

459. Bigamy—(a) In General.—Bigamy is committed where a person who is already legally married marries another person during the life of his or her wife or husband.[387] It is punished in England and in this country by statute, except in certain cases.

Bigamy is not a common-law offense.[388] It was first made an offense cognizable by the civil courts, and punishable as a felony, by the statute of 1 James I. c. 2. Prior to this statute it was punished only as a canon-

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115; Britain v. State, 3 Humph. (Tenn.) 203; State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; Barker v. Com., 19 Pa. St. 412; and cases cited specifically in notes following.

[387] Steph. Dig. Crim. Law, art. 257.

[388] 4 Bl. Comm. 163; State v. Burns, 90 N. C. 707.

ical offense in the ecclesiastical courts. Statutes punishing the offense have also been enacted in this country. The present English statute declares that "whosoever, being married, shall marry any other person during the life of the former husband or wife, * * * shall be guilty of felony," but contains a proviso that nothing in the section shall apply "to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time," nor to "any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage," nor to "any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." [389] The statutes in this country are similar, and very generally contain similar provisos.

(*b*) *The Bigamous Marriage.*—Of course bigamy cannot be committed unless there is

[389] 24 & 25 Vict. c. 100, § 57. Similar to 9 Geo. IV. c. 31, § 22.

a marriage, or, rather, unless the parties go through the form or ceremony of a marriage.[390] The marriage need not be valid. It cannot be, for the prior marriage necessarily renders it void.[391] According to the better opinion, it need not even be such that it would be valid if there had not been any prior marriage.[392] Certainly that it is voidable merely is no defense,[393]

(*c*) *Cohabitation* after the bigamous marriage is not necessary.[394]

(*d*) *The Prior Marriage.*—By the very terms of the statute, the party marrying, to be guilty of bigamy, must be already mar-

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[390] Reg. v. Allen, L. R. 1 C. C. 367, 12 Cox, C. C. 193; Beggs v. State, 55 Ala. 108.

[391] See Com. v. McGrath, 140 Mass. 296; supra, note 395.

[392] Reg. v. Brawn, 1 Car. & K. 144, 1 Cox, C. C. 33; Reg. v. Allen, L. R. 1 C. C. 367, 12 Cox, C. C. 193; People v. Brown, 34 Mich. 339, 22 Am. Rep. 531; Hayes v. People, 25 N. Y. 390, 82 Am. Dec. 364. Contra, Reg. v. Fanning, 17 Ir. C. L. 289, 10 Cox, C. C. 411.

[393] See Reg. v. Asplin, 12 Cox, C. C. 391.

[394] State v. Patterson, 2 Ired. (N. C.) 346, 38 Am. Dec. 699; Com. v. Lucas, 158 Mass. 81; Nelms v. State, 84 Ga. 466, 20 Am. St. Rep. 377; U. S. v. West, 7 Utah, 437.

ried to another person. If the prior marriage was void, either because of want of mutual consent, or because the other party thereto was already married, or because of consanguinity between the parties within the prohibited degrees, or because of civil conditions, or for any other reason, the offense is not committed.[395] It is otherwise, however, if the prior marriage is merely voidable, and has not been annulled or avoided.[396]

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[395] Reg. v. Chadwick, 11 Q. B. 173, 205, 2 Cox, C. C. 381; Kopke v. People, 43 Mich. 41; Davis v. Com., 13 Bush (Ky.) 318; State v. Cone, 86 Wis. 498; Holbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; Com. v. McGrath, 140 Mass. 296.

This applies where a man marries a third time after the death of the first wife. The second marriage is void because of the prior first marriage, and the third marriage, therefore, is legal, and not bigamous. Reg. v. Willshire, 6 Q. B. Div. 366, 14 Cox, C. C. 541; Holbrook v. State, supra.

[396] Rex v. Jacobs, 1 Mood. C. C. 140; Beggs v. State, 55 Ala. 108; State v. Cone, 86 Wis. 498; Walls v. State, 32 Ark. 565.

In some cases of voidable marriage, the marriage can only be avoided by a decree of nullity, and a second marriage, without first obtaining such a decree, is bigamous. See the cases above cited. But in other cases, as in some jurisdictions, where the party is under the age of consent, the marriage may be effectually avoided

As a general rule, for the purpose of a prosecution for bigamy, a prior marriage which was valid in the place where it was contracted is valid everywhere, and a marriage which was void in the place where it was contracted is void everywhere, for the validity of a marriage is governed by the *lex loci contractus*.[397]

(*e*) *Divorce or Annulment of Prior Marriage.*—By the express terms of most of the statutes, and even in the absence of an express proviso, a person who has been married does not commit bigamy in marrying again after a valid divorce from the bonds of the prior marriage, or after a decree of nullity,[398] unless, as is the case in some states, he is prohibited from marrying again, and the second marriage is in the same jurisdic-

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by the act of the party in disaffirming and repudiating it, without any decree of nullity, and, in such a case, a marriage by either party after such disaffirmance is not bigamous. Shafher v. State, 20 Ohio, 1; People v. Slack, 15 Mich. 193.

[397] State v. Ross, 76 N. C. 242, 22 Am. Rep. 678; Bird v. Com., 21 Grat. (Va.) 800; State v. Clark, 54 N. H. 456; Weinberg v. State, 25 Wis. 370. There are some exceptions to this rule, as where parties leave a state to be married, in vio-

tion.[399] This does not apply to a divorce from bed and board only, or a mere separation, nor does it apply where the divorce is granted after the second marriage,[400] or where the decree of divorce is void for want of jurisdiction.[401]

(*f*) *The Criminal Intent.*—The statutes do not require any specific criminal intent in bigamy, but all that is necessary is that a party shall intentionally marry again when he knows that he is already legally married to another person.[402] Whether religious belief or mistake of fact or of law is a good defense is elsewhere considered.[403]

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lation of its laws, etc. See State v. Kennedy, 76 N. C. 251, 22 Am. Rep. 683.

[399] State v. Norman, 2 Dev. (N. C.) 222; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

[399] Com. v. Richardson, 126 Mass. 34, 30 Am. Rep. 647; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

[400] Baker v. People, 2 Hill (N. Y.) 325.

[401] People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; State v. Armington, 25 Minn. 29.

[402] Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Com. v. Nash, 7 Metc. (Mass.) 472, Beale's Cas. 304; Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2.

[403] Ante, §§ 56, 64, 65, 70, 73.

(*g*) *Death or Absence of Former Spouse.* —The death of the former husband or wife before the second marriage necessarily prevents the second marriage from being bigamous, and his or her absence for a long period may raise a presumption of death. In most jurisdictions, the statute expressly provides that it shall not apply to any person marrying again after his or her wife or husband has been continually absent for a specified period (the period varying in the different jurisdictions from two to seven years), without being known by such person to be living within such period.[404]

460. Incest.—Incest is marriage or cohabitation, or sexual intercourse without marriage, between a man and woman who are related to each other within the degrees within which marriage is prohibited by law.[405] In most states it is punished by statute.

It seems that incest was not a crime at all at common law, but was left entirely to the ecclesiastical courts.[406] In most states, how-

[404] As to the effect of absence for less than the period specified, and bona fide belief in death, see ante, §§ 56, 70.

[405] See Cent. Dict. & Cyc. tit. "Incest;" 1 Bouv. Law Dict. tit. "Incest."

[406] State v. Keesler, 78 N. C. 469. See 4 Bl. Comm. 64.

ever, if not in all, it is now punished by statute. These statutes are not precisely the same in all states, but they are substantially so. They punish any persons who, being within the degrees of consanguinity, or in some states of affinity also,[407] within which marriages are declared to be incestuous and void, intermarry or commit adultery or fornication with each other. To constitute the offense the parties must be related within the prohibited degrees, as in the case of parent and child, brother and sister, uncle or aunt and niece or nephew, etc.;[408] and the party or parties accused must have known of the relationship.[409] Relationship of the half-

[407] See Norton v. State, 106 Ind. 163; McGrew v. State, 13 Tex. App. 340; Stewart v. State, 39 Ohio St. 152.

[408] Step-parent and step-child are within the statutes within the life of the child's parent, Baumer v. State, 49 Ind. 544; Norton v. State, 106 Ind. 163; but not after such parent's death or divorce, Johnson v. State, 20 Tex. App. 609, 54 Am. Rep. 535; Noble v. State, 22 Ohio St. 541.

[409] State v. Ellis, 74 Mo. 385, 41 Am. Rep. 321; Baumer v. State, 49 Ind. 544, 19 Am. Rep. 691.

If one of the parties know of the relationship, he or she is guilty, though the other may be innocent. State v. Ellis, supra.

blood is within the statutes;[410] and illegitimate consanguinity is of the same effect as legitimate.[411] Marriage is not necessary to constitute the offense, but sexual intercourse is necessary.[412] The intercourse, however, need not be proved by direct evidence, but may be inferred from marriage and cohabitation, or from cohabitation without marriage.[413] Cohabitation is not necessary unless required by the statute, but a single act of sexual intercourse is sufficient.[414]

461. Sodomy.—Sodomy or buggery, which is sexual connection by a man or woman with a brute animal, or connection per anum by a man with any other man, or with a woman, is a felony at common law.[415]

Sodomy or buggery is spoken of by the courts and in statutes as "the unnatural crime," or "the crime against nature." It

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[410] State v. Wyman, 59 Vt. 527.

[411] People v. Lake, 110 N. Y. 61; State v. Lawrence, 95 N. C. 659.

[412] State v. Schaunhurst, 34 Iowa, 547; People v. Murray, 14 Cal. 160.

[413] State v. Schaunhurst, supra.

[414] State v. Brown, 47 Ohio St. 102, 21 Am. St. Rep. 790.

[415] Steph. Dig. Crim. Law, art. 168; 4 Bl. Comm. 215; 1 Whart. Crim. Law, § 579; Rex v. Jacobs,

is so disgusting a crime against morality and decency that it is punished by the common law, not as a misdemanor merely, but as a felony. To constitute the offense, there must be some penetration, but the least penetration is sufficient.[416] Whether emission was necessary at common law is doubtful,[417] but the statutes very generally declare it unnecessary.[418] It is not necessary that the act shall be done without the consent of the other party.[419]

462. Fornication and Adultery.—Fornication and adultery were not common-law crimes in England, nor, by the weight of authority, are they so in this country, unless committed openly and notoriously, so as to constitute a public nuisance.

Russ. & R. 331; Reg. v. Allen, 1 Car. & K. 495; Reg. v. Allen, 1 Den. C. C. 364, 2 Car. & K. 869, 3 Cox, C. C. 270, 13 Jur. 108; Com. v. Thomas, 1 Va. Cas. 307.

The act in a child's mouth is not sodomy. Rex v. Jacobs, supra; Com. v. Thomas, supra.

[416] Rex v. Duffin, 1 East, P. C. 437, Russ. & R. 365.

[417] See Rex v. Duffin, supra.

[418] Rex v. Reekspear, 1 Mood. C. C. 342; Rex v. Cozins, 6 Car. & P. 351.

[419] Reg. v. Jellyman, 8 Car. & P. 604; Reg. v. Allen, 1 Den. C. C. 364, 2 Car. & K. 869, 3 Cox, C. C. 270, 13 Jur. 108.

In many states, however, they are now punished by statute.

Definitions.—There is some difference of opinion as to the definitions of "fornication" and "adultery," so that what is fornication in one state may be adultery in another, and *vice versa.* As we shall see, these acts were not punished at common law, but were punished as ecclesiastical offenses in the ecclesiastical courts. They were known, however, to the common law for some purposes, but the common-law and canon-law definitions differed. The common law regarded adultery only as it tended to expose a husband to the maintenance of another man's children, and to having another man's children inherit his property, and it was therefore necessary that the woman should be married. Intercourse by a man, whether married or single, with another man's wife, was adultery in both, but intercourse by a man, whether married or single, with an unmarried woman, was not adultery in either, but fornication only.[420] The canon law, on the other hand, condemned and punished adultery be-

[420] 3 Bl. Comm. 139; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284.

cause of the violation of the marriage vow, and did not necessarily require the woman to be married. For a married person, whether a man or a woman, and a single person to have sexual intercourse was adultery on the part of the married person, and fornication on the part of the single person.[421] Of course, two single persons cannot be guilty of adultery under either definition.[422] In construing statutes punishing fornication and adultery without defining the offense, some courts have adopted the common-law definition,[423] while others have adopted the definition of the canon or ecclesiastical law.[424]

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[421] Com. v. Kilwell, 1 Pittsb. (Pa.) 255; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

[422] Com. v. Kilwell, supra; Smitherman v. State, 27 Ala. 23; State v. Thurstin, 35 Me. 205, 58 Am. Dec. 695.

[423] State v. Wallace, 9 N. H. 515; State v. Taylor, 58 N. H. 331; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Pearce, 2 Blackf. (Ind.) 318; State v. Lash, 16 N. J. Law, 380, 32 Am. Dec. 397.

[424] Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; Helfrich v. Com., 33 Pa. St. 68, 75 Am. Dec. 579; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; State v. Hutchinson, 36 Me. 261; Territory v. Whitcomb, 1 Mont. 359; Miver v. People, 53 Ill. 59; Com. v. Lafferty, 6 Grat. (Va.) 672.

As a Common-Law or Statutory Offense. —In England, fornication and adultery were punished in the ecclesiastical courts, but they were not regarded as crimes at common law, unless committed openly.[425] Nor, according to the weight of authority, are they punishable at common law in this country.[426] It is otherwise, however, if they are committed openly and notoriously, so as to set a pernicious example, create public scandal, and thus constitute a public nuisance.[427] In most states, these offenses against public morals and decency are now expressly punished by statute.[428] The necessity for a

[425] 3 Bl. Comm. 139; 4 Bl. Comm. 65.

[426] Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; State v. Brunson, 2 Bailey (S. C.) 149; Delaney v. People, 10 Mich. 241; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; State v. Cooper, 16 Vt. 551; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; Brooks v. State, 2 Yerg. (Tenn.) 482; State v. Cagle, 2 Humph. (Tenn.) 414; State v. Moore, 1 Swan (Tenn.) 136.

[427] State v. Moore, 1 Swan (Tenn.) 136.

In the case of open adultery, it is the nuisance, not the mere adultery, that is punishable. See State v. Brunson, 2 Bailey (S. C.) 149.

[428] See Am. & Eng. Enc. Law (2d Ed.) tits. "Adultery;" "Fornication."

criminal intent in these offenses, and the effect of ignorance of fact and of law, are elsewhere considered.[429]

463. Illicit Cohabitation.—Illicit cohabitation of a man and woman is a misdemeanor at common law if open and notorious, but not otherwise. In many jurisdictions, however, it is punished by statute, though not open and notorious.

Illicit cohabitation includes fornication or adultery, according to the circumstances, but it is something more. It is a living together in fornication or adultery. It is not a crime at all at common law unless the cohabitation is open and notorious, so as to amount to public immorality and a public scandal.[430] In many jurisdictions, statutes have been enacted expressly punishing such acts, in some states, though not in all, whether committed openly and notoriously, or secretly. These statutes vary in the different states. Some in terms punish illicit cohabitation, while others punish lewd and lascivious cohabitation, and others punish living in adultery or fornication, but the meaning is substantially

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[429] Ante, §§ 56, 70, 73.

[430] State v. Brunson, 2 Bailey (S. C.) 149; Delaney v. People, 10 Mich. 241; State v. Cooper, 16 Vt. 551; State v. Moore, 1 Swan (Tenn.) 136.

the same in all. To bring a case within the statutes, it must appear that there was something more than a single act of intercourse. There must be, in the language of the statutes, cohabitation or a living together, and this implies some continuance.[431] It is not necessary, however, that the illicit relation shall continue for more than one day.[432] In some states the statutes expressly require that the cohabitation or living together shall be "open and notorious."[433]

464. Seduction.—Seduction of a woman is made a crime in most states by statute. It consists in the act of seducing an unmarried female of previous chaste character, and having sexual intercourse with her, under promise of marriage, or, in some states, by other seductive means.

Seduction of a female, and having sexual intercourse with her under a promise of mar-

[431] Hall v. State, 53 Ala. 463; Com. v. Calef, 10 Mass. 153; Com. v. Catlin, 1 Mass. 8; Searls v. People, 13 Ill. 597; Miner v. People, 58 Ill. 59; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; McLeland v. State, 25 Ga. 477; State v. Crowner, 56 Mo. 147.

[432] Hall v. State, 53 Ala. 463.

[433] State v. Crowner, 56 Mo. 147; Wright v. State, 5 Blackf. (Ind.) 358.

riage, is not a crime at common law,[434] but in this country it is very generally made so by statute. Most of the statutes in terms punish any man who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character. Under such a statute, a promise of marriage is essential, but it may be a conditional promise,[435] or a promise that is not binding.[436] The woman must be induced to submit by means of the promise, otherwise there is no seduction.[437] The man need not be of age.[438] Nor need he be an unmarried man. It is sufficient if the woman thinks he is unmarried.[439] If she knows

[434] Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

[435] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Boyce v. People, 55 N. Y. 644. And see Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211.

[436] Crozier v. People, 1 Park. Cr. R. (N. Y.) 453; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177.

[437] Phillips v. State, 108 Ind. 406; Carney v. State, 79 Ala. 14; People v. De Fore, 64 Mich. 693; State v. Fitzgerald, 63 Iowa, 268.

[438] Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; Polk v. State, 40 Ark. 482, 48 Am. Rep. 17.

[439] State v. Primm, 98 Mo. 368.

he is married, there is no seduction.[440] The promise need not be made with intention not to perform it.[441]

Some of the statutes do not require the seduction to be under promise of marriage, but apply where a female is seduced and debauched, either by such a promise, or by any other art, influence, promise, or deception calculated to accomplish the purpose.[442] "The exact amount, or what kind of seductive art, is necessary to establish the offense, cannot be defined. Every case must depend upon its own peculiar circumstances, together with the condition in life, advantages, age, and intelligence of the parties."[443] In all cases, the woman must be *"seduced."* This term implies that the intercourse shall be accomplished by artifice and deception, and that there shall be something more than a yielding by the woman to mere lust or passion.[444]

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[440] Callahan v. State, 63 Ind. 198, 30 Am. Rep. 211; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664.

[441] State v. Bierce, 27 Conn. 319.

[442] State v. Patterson, 88 Mo. 88, 57 Am. Rep. 374.

[443] State v. Higdon, 32 Iowa, 262.

[444] Carney v. State, 79 Ala. 14; State v. Reeves,

Some statutes require some other artifice or persuasion in addition to a promise of marriage. But, as was said in a Georgia case: "To make love to a woman, woo her, make honorable proposals of marriage, have them accepted, and afterwards undo her under a solemn repetition of the engagement vow, is to employ persuasion, as well as promises of marriage."[445]

Who may be Seduced.—The statutes generally in terms apply only to the seduction of unmarried females, and the fact that the woman was unmarried must be shown.[446] They also very generally require in express terms that the female shall be of previous chaste character. And, even in the absence of an express requirement to this effect, it is to be implied.[447] This means actual per-

97 Mo. 668; Phillips v. State, 108 Ind. 406; State v. Fitzgerald, 63 Iowa, 268; State v. Patterson, 88 Mo. 88, 57 Am. Rep. 374; People v. De Fore, 64 Mich. 693.

[445] Wilson v. State, 58 Ga. 328.

[446] West v. State, 1 Wis. 209; Mesa v. State, 17 Tex. App. 395; State v. Carr, 60 Iowa, 453.

[447] Polk v. State, 40 Ark. 482, 48 Am. Rep. 17; People v. Clark, 33 Mich. 112; People v. Roderigas, 49 Cal. 9; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664.

sonal virtue, and not merely reputation.[448] According to the better opinion, chastity of character will be presumed until the contrary is proven.[449] The expressions "chaste character," "virtuous female," etc., it has been held, do not necessarily mean that, to prevent a conviction, it must be shown that the female had previously been guilty of sexual intercourse. Though there are decisions to the contrary, it has been held that a female is unchaste, within the meaning of the statute, if her conversation and conduct is lascivious and indecent, though she may be a virgin.[450] The

[448] Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177.

[449] Polk v. State, 40 Ark. 482, 48 Am. Rep. 17; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664; People v. Brewer, 27 Mich. 134; People v. Clark, 33 Mich. 112; People v. Squires, 49 Mich. 487; Wilson v. State, 73 Ala. 527. Contra, Zabriskie v. State, 43 N. J. Law, 640, 39 Am. Rep. 610; Oliver v. Com., 101 Pa. St. 215, 47 Am. Rep. 704.

[450] Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708. But see, to the contrary, Wood v. State, 48 Ga. 192, 15 Am. Rep. 664. And see State v. Brinkhaus, 34 Minn. 285, where it was held that, although a female, from ignorance or other causes, may have so low a standard of propriety

question is whether the female was of chaste character at the time she was seduced. One who, at some time in the past, has been guilty of sexual intercourse, but who has reformed, is within the statutes.[451]

Subsequent Marriage.—By express provision of the statutes in most states, the subsequent intermarriage of the parties is a bar to a prosecution for seduction.[452] But this is not the case in the absence of such a provision, for, as was shown in another place, the person injured by a crime cannot prevent a prosecution by afterwards condoning the offense.[453]

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as to commit or permit indelicate acts or familiarities, yet if she has such a sense of virtue that she would not surrender her person unless seduced to do so under a promise of marriage, she cannot be said to be a woman of unchaste character, within the meaning of the statute.

[451] People v. Clark, 33 Mich. 112; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; State v. Carron, 18 Iowa, 372, 87 Am. Dec. 401; Wood v. State, 48 Ga. 192, 15 Am. Rep. 664; State v. Brassfield, 81 Mo. 151, 51 Am. Rep. 234.

[452] See People v. Gould, 70 Mich. 240. But an offer of marriage by the man, refused by the girl, is no bar. State v. Thompson, 79 Iowa, 703.

[453] Ante, § 156.

465. Bawdy Houses.—A common bawdy house, or house to which persons may and do resort for the purpose of prostitution, is a disorderly house, and is a nuisance and misdemeanor at common law.

That a common bawdy house is a disorderly house and a public nuisance, and that the keeper thereof is guilty of a misdemeanor at common law, is beyond question.[454] Such a place is injurious, both to the public morals and to the public health, and it also endangers the public peace, but it is regarded as a nuisance on the first ground chiefly.[455] In most jurisdictions, the offense is punished by statute. Some statutes use the expression,

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[454] 3 Inst. 204; 1 Hawk. P. C. c. 74, § 6; Reg. v. Williams, 10 Mod. 63, 1 Salk. 384; U. S. v. Gray, 2 Cranch, C. C. 675, Fed. Cas. No. 15,251; State v. Worth, R. M. Charlt. (Ga.) 5; State v. Porter, 38 Ark. 637; Smith v. State, 6 Gill (Md.) 425; Henson v. State, 62 Md. 231, 50 Am. Rep. 204; Com. v. Goodall, 165 Mass. 588; People v. King, 23 Hun, 148, 83 N. Y. 587, Beale's Cas. 847; State v. Evans, 5 Ired. (N. C.) 603.

[455] "It is clearly agreed that keeping a bawdy house is a common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons, and also has an apparent tendency to corrupt the manners of both sexes by such an open profession of lewdness." State v. Porter, 38 Ark. 638.

"house of ill fame," instead of "bawdy house," but they are practically synonymous.[456] To constitute a place a bawdy house or house of ill fame, it must be kept for the purpose of resort for prostitution. A single act of intercourse in a house is not enough to give it such a character.[457] Nor does the fact that the proprietor of a house practices lewdness with her visitors give the house such a character. The place must be a common resort for the purpose of prostitution.[458] The immoral purpose for which the house is kept is what makes it disorderly and a public nuisance, and it is not necessary that there shall be any noise or other disturbance, or that any indecency or disorderly conduct shall be visible from the out-

[456] State v. Plant, 67 Vt. 454, 48 Am. St. Rep. 821; Betts v. State, 93 Ind. 375; State v. Clark, 78 Iowa, 492.

[457] Com. v. Lambert, 12 Allen (Mass.) 177; State v. Lee, 80 Iowa, 75, 20 Am. St. Rep. 401; State v. Clark, 78 Iowa, 492; State v. Garing, 74 Me. 152.

[458] People v. Buchanan, 1 Idaho, 689; State v. Evans, 5 Ired. (N. C.) 607; State v. Calley, 104 N. C. 858, 17 Am. St. Rep. 704; State v. Lee, 80 Iowa, 75, 20 Am. St. Rep. 401. Contra, People v. Mallette, 79 Mich. 600.

side.[459] The nature of the place which is kept is not generally material, if it is kept as a resort for the purpose of prostitution. It may be a house in the ordinary sense, or it may be a room or rooms in a house,[460] or it may be a canvas tent, or a boat.[461]

Letting Premises for Immoral Purpose.— If the owner of a house leases it to another for the purpose of keeping a bawdy house, or afterwards encourages or participates in the keeping of the same, or, by the weight of authority, if he leases it with knowledge that it is to be so kept, he is guilty of a misdemeanor at common law.[462]

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[459] Reg. v. Rice, L. R. 1 C. C. 21; Com. v. Gannett, 1 Allen (Mass.) 7, 79 Am. Dec. 693; People v. King, 23 Hun, 148, 83 N. Y. 587, Beale's Cas. 847; Herzinger v. State, 70 Md. 278.

[460] 1 Russ. Crimes, 443; Rex v. Peirson, 2 Ld. Raym. 1197; State v. Garity, 46 N. H. 61.

[461] Killman v. State, 2 Tex. App. 222, 28 Am. Rep. 432; State v. Mullen, 35 Iowa, 199.

[462] Com. v. Harrington, 3 Pick. (Mass.) 26; Smith v. State, 6 Gill (Md.) 425; State v. Williams, 30 N. J. Law, 102; People v. Erwin, 4 Denio (N. Y.) 129; Campbell v. State, 55 Ala. 89; Ross v. Com., 2 B. Mon. (Ky.) 417; State v. Smith, 15 R. I. 24. Contra, in case of merely leasing with knowledge, State v. Wheatley, 4 Lea (Tenn.) 230.

466. Gaming and Gaming Houses.—Gaming is not an offense at common law; but a common gaming house, to which the public may resort for the purpose of gaming, is a public nuisance, and keeping the same is a misdemeanor at common law.

The act of gaming or gambling is no offense at all unless, as is now the case in most states, it is expressly prohibited and punished by statute. It was not regarded as a misdemeanor at common law.[463] Nor is it an offense to permit persons to gamble in a private house, to which others do not resort for such purpose.[464] This is not true, however, of the keeping of a *common* gaming house. A common gaming house is a house, room, or place kept for the purpose of gaming, and to which persons may and do resort for such purpose, and is a disorderly house. To keep such a place is a public nuisance and misdemeanor at common law, not only because of the tendency of such a place to lead to breaches of the peace, but also because of its tendency to encourage idleness and avarici-

[463] State v. Layman, 5 Harr. (Del.) 510; Com. v. Stahl, 7 Allen (Mass.) 304; State v. Mathews, 2 Dev. & B. (N. C.) 424.

[464] State v. Mathews, 2 Dev. & B. (N. C.) 424. See, also, Estes v. State, 2 Humph. (Tenn.) 496.

isness, and to corrupt the public morals.[465] he purpose for which the house is kept ren- ers it disorderly, and no noise or disturb- ice is necessary.[466] It has been held that eeping a place for the illegal sale of lottery ckets is not keeping a gaming house, nor nuisance.[467]

Statutes have been enacted in many states r the purpose of suppressing gaming, and ese statutes cover and punish many acts hich were not punished at common law. he statutes vary very much in the different ates. Generally they prohibit and punish ming, either in particular places, or gen- ally, and in any place.[468] And they pun-

[465] 1 Hawk. P. C. c. 75, § 6; Rex v. Dixon, 10 od. 335; Rex v. Medlov, 2 Show. 30; Rex. v. ogier, 1 Barn. & C. 272; U. S. v. Dixon, 4 anch, C. C. 107, Fed. Cas. No. 14,970; People King, 23 Hun, 148, 83 N. Y. 587, Beale's Cas. 7; Vanderworker v. State, 13 Ark. 700; State Haines, 30 Me. 65; Lord v. State, 16 N. H. 0, 41 Am. Dec. 729; State v. Doon, R. M. Charlt. a.) 1; People v. Jackson, 3 Denio (N. Y.) 1, 45 Am. Dec. 449, Beale's Cas. 121.

[466] State v. Doon, R. M. Charlt. (Ga.) 1.

[467] People v. Jackson, 3 Denio (N. Y.) 101, Am. Dec. 449, Beale's Cas. 121.

[468] See Am. & Eng. Enc. Law (2d Ed.) tit. aming."

ish, not only the keeping of a gaming house, but the permitting of gaming, and the exhibition, setting up, or keeping of gaming tables and devices, or particular kinds of tables or devices.[469]

467. Obscene Libels.—An obscene libel is an obscene writing, book, or print. To publish such a libel, or otherwise expose the same to public view, is a public nuisance, and a misdemeanor at common law.

To publish any obscene writing or print, or any book containing obscene matter, by selling or exhibiting the same, or to otherwise expose it to the public view, is clearly a public nuisance, because of its tendency to corrupt public morals, and to shock the public sense of decency, and it is well settled that it is indictable as a misdemeanor at common law.[470] "The test of obscenity," said Chief Justice Cockburn in an English case, "is this: Whether the tendency of the matter

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[469] See Id. tit. "Gaming Houses."

[470] Reg. v. Curl, 2 Strange, 788; Reg. v. Hicklin, L. R. 3 Q. B. 360, 11 Cox, C. C. 19; Reg. v. Carlile, 1 Cox, C. C. 229; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632, Beale's Cas. 113; Com. v. Holmes, 17 Mass. 336; McNair v. People, 89 Ill. 441; Bell v. State, 1 Swan (Tenn.) 42.

charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences."[471] Depositing obscene matter in the mails is expressly punished by an act of congress. On an indictment for publishing an obscene libel, or for depositing obscene matter in the mails, it is no defense for the accused to say that he was actuated by a good motive, as by the desire to correct evils and abuses in sexual intercourse.[472]

468. Obscene, Indecent, or Disgusting Exhibitions.—Any obscene or indecent exhibition in public, or any exhibition which, though not obscene or indecent, is so disgusting as to be offensive, is a misdemeanor at common law.

Obscene and indecent exhibitions, which tend to corrupt public morals, or to shock the public sense of decency, are clearly public nuisances, and indictable at common law. This is true, for example, of obscene and indecent tableaux and theatrical performances, obscene and indecent pictures, figures, and the like.[473] On the same principle, it is a

[471] Reg. v. Hicklin, L. R. 3 Q. B. 360, 11 Cox. C. C. 19.

[472] U. S. v. Harmon, 45 Fed. 414, Beale's Cas. 180.

[473] Reg. v. Saunders, 1 Q. B. Div. 15, 13 Cox.

misdemeanor to let a stallion to mares in a street or other public place.[474] An exhibition may also be a nuisance because of its disgusting nature, though it may not be obscene or indecent. Thus, where a herbalist publicly exposed in his shop on a highway a picture of a man naked to the waist, and covered with eruptive sores, it was held that an indictment for nuisance would lie because of the disgusting and offensive nature of the exhibition, although there was nothing immoral or indecent in the picture, and although the motive in exhibiting it was innocent.[475]

469. Indecent Exposure.—Indecent exposure of the person to public view, if intentional, or even when due to negligence, is a public nuisance and a misdemeanor at common law.[476]

To render indecent exposure a public nuisance, the exposure must be in a public

C. C. 116; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632, Beale's Cas. 113; Pike v. Com., 2 Duv. (Ky.) 89.

[474] Crane v. State, 3 Ind. 193.

[475] Reg. v. Grey, 4 Fost. & F. 73.

[476] Rex v. Sydlye, 1 Keb. 620, 10 St. Tr. Ap. 93; Reg. v. Thallman, Leigh. & C. 326, 9 Cox, C. C. 388; Reg. v. Reed, 12 Cox, C. C. 1, Beale's Cas. 369; Reg. v. Harris, L. R. 1 C. C. 282, 11

place, or else it must be in such a place that a number of persons may be offended by it.[477] To indecently expose the person to one person only in private is not indictable unless made so by statute.[478] As was shown in a previous chapter, persons who bathe naked in the sea, near a public road, along which women pass, and in sight of women so passing, are guilty of a public nuisance, and, on an indictment therefor, it is no defense to show a custom to bathe there, though it may have existed for half a century without complaint.[479]

470. Obscene and Profane Language.—It is a public nuisance and a misdemeanor at common

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Cox, C. C. 659; Com. v. Haynes, 2 Gray (Mass.) 72; State v. Roper, 1 Dev. & B. (N. C.) 208; State v. Rose, 32 Mo. 560; Ardery v. State, 56 Ind. 328.

[477] Reg. v. Thallman, Leigh & C. 326, 9 Cox, C. C. 388; Reg. v. Holmes, Dears. C. C. 207, 6 Cox, C. C. 216; Reg. v. Harris, L. R. 1 C. C. 282, 11 Cox, C. C. 659.

[478] Reg. v. Webb, 1 Den. C. C. 338, 3 Cox, C. C. 183; Reg. v. Farrell, 9 Cox, C. C. 446; State v. Millard, 18 Vt. 574.

[479] Reg. v. Reed, 12 Cox, C. C. 1, Beale's Cas. 369; ante, § 84. And see Rex v. Crunden, 2 Camp. 89.

law to publicly utter obscene language, or to profanely curse or swear in public.

Both obscene language and profane cursing or swearing are punished at common law when the offense is committed in public, and in such a way as to constitute an annoyance to the public,[480] but not when the language is uttered in private, for in the latter case, though wrong, it is not a public nuisance.[481] It seems, also, that a single act of profane swearing or cursing is not indictable unless there are aggravating circumstances.[482]

471. Blasphemy.—Blasphemy is the malicious reviling of God or the Christian religion. It is a

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[480] State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; Barker v. Com., 19 Pa. St. 412; Bell v. State, 1 Swan (Tenn.) 42; State v. Graham, 3 Sneed (Tenn.) 134; Goree v. State, 71 Ala. 7; State v. Ellar, 1 Dev. (N. C.) 267; State v. Powell, 70 N. C. 67; State v. Brewington, 84 N. C. 783; State v. Chrisp, 85 N. C. 528, 39 Am. Rep. 713; Young v. State, 10 Lea (Tenn.) 165; State v. Archibald, 59 Vt. 548, 59 Am. Rep. 755.

[481] See State v. Brewington, 84 N. C. 783; Ex parte Delaney, 43 Cal. 478; Com. v. Linn, 158 Pa. St. 22; Young v. State, 10 Lea (Tenn.) 165; Gaines v. State, 7 Lea (Tenn.) 410, 40 Am. Rep. 64.

[482] See the cases cited in the note preceding.

misdemeanor at common law. If written or printed and published, the offense is called "blasphemous libel."

Strictly speaking, Christianity is not a part of our common law,[483] but, as we are a Christian people, the reviling of God and the Christian religion is offensive, and a public nuisance. To openly and maliciously blaspheme not only offends the public sense of religion, but it tends to provoke breaches of the public peace, and it is well settled that it is a misdemeanor at common law.[484] Malice is an essential element of the offense.[485]

Blasphemous Libel. — If blasphemous words or signs are written or printed and published, the offense is called "blasphemous libel." To publish a blasphemous libel is a misdemeanor at common law.[486]

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[483] Ante, § 457.

[484] 4 Bl. Comm. 59; Taylor's Case, 1 Vent. 293, Beale's Cas. 96; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Updegraph v. Com., 11 Serg. & R. (Pa.) 394; Ex parte Delaney, 43 Cal. 478.

[485] Reg. v. Ramsay, 15 Cox, C. C. 231. And see People v. Ruggles, supra; Updegraph v. Com., supra.

[486] Rex v. Carlile, 3 Barn. & Ald. 161; Rex v. Waddington, 1 Barn. & C. 26. See Com. v.

472. Drunkenness.—Public drunkenness is a nuisance and misdemeanor at common law.

There is nothing in the law to prevent a man from becoming as drunk as he chooses, provided he does so in private, but he cannot do so in public, since his drunkenness then becomes a public nuisance. Statutes were enacted at an early day in England punishing drunkenness by a fine and by sitting in the stocks,[487] and there are statutes in this country making public drunkenness a misdemeanor; but, independently of any statute, it is a nuisance, and indictable as a misdemeanor at common law.[488]

473. Offenses with Respect to Dead Bodies.—It is a misdemeanor at common law to so treat or deal with a dead body as to shock the public sense of decency.

Thus, it has been held a misdemeanor to indecently throw the dead body of a child into a river, instead of burying it, or causing

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Kneeland, 20 Pick. (Mass.) 211, distinguishing between "blasphemy" and "blasphemous libel."

[487] 4 Jac. I. c. 5; 4 Bl. Comm. 64.

[488] Tipton v. State, 2 Yerg. (Tenn.) 542. And see State v. Waller, 3 Murph. (N. C.) 229; Hutchison v. State, 5 Humph. (Tenn.) 142.

it to be buried;[489] to inexcusably leave a dead body exposed, instead of causing it to be buried;[490] to unlawfully disinter a dead body for the purpose of dissection, or for any other unlawful purpose;[491] to sell it, without lawful authority, for the purpose of dissection, or to take it with intent to sell it.[492] It is not a misdemeanor to cremate a body instead of burying it, unless it is done for an unlawful purpose, or in such a way as to amount to a public nuisance.[493] To burn or otherwise dispose of a dead body to prevent the holding of a coroner's inquest thereon is

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[489] Kanavan's Case, 1 Me. 226, Beale's Cas. 115.

[490] Reg. v. Clark, 15 Cox, C. C. 171. And see Reg. v. Vaun, 2 Den. C. C. 325.

[491] Reg. v. Sharpe, Dears. & B. C. C. 160, 7 Cox, C. C. 214, Beale's Cas. 175; Rex v. Lynn, 1 Leach, C. C. 497, 2 Term R. 733, Beale's Cas. 103; Com. v. Loring, 8 Pick. (Mass.) 370; Com. v. Cooley, 10 Pick. (Mass.) 37; Tate v. State, 6 Blackf. (Ind.) 110.

[492] Rex v. Cundick, Dowl. & R. N. P. 13; Rex v. Gilles, Russ. & R. 366, note. This may, however, be authorized by law. See Reg. v. Feist, Dears. & B. C. C. 590, 8 Cox, C. C. 18.

[493] Reg. v. Price, 12 Q. B. Div. 247, 15 Cox, C. C. 389.

a misdemeanor.[494] This subject is now very generally regulated by statute.

VI. OFFENSES AFFECTING THE PUBLIC TRADE.

474. In General.—Certain offenses were punished in England at common law or by statute because they injuriously affected the public trade, and various acts are punished by statute in this country on the same ground. Among the offenses which have been or are now thus punished are the following:

1. **Owling, or the transporting of wool or sheep out of the kingdom, to the detriment of its staple manufacture.**
2. **Smuggling, or the importing of goods without paying the duties imposed by law.**
3. **Fraudulent bankruptcy.**
4. **Usury, or the taking of excessive interest on a loan or forbearance of money.**
5. **Cheating.**
6. **Forestalling the market, regrating, and engrossing.**
7. **Monopolies.**

475. Owling.

The offense called "owling" consisted in the transporting of wool or sheep out of England, to the detriment of its staple manufacture. It was an offense at common law, and was also punished by the statute of 2

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[494] Reg. v. Price, supra; Reg. v. Stephenson, 13 Q. B. Div. 331.

Edw. III. c. 1, and other early statutes. It was called "owling" because of its being usually carried out at night.[495]

476. Smuggling.

Smuggling is the offense of importing goods without paying the duties imposed by the laws of the customs and excise. This was made a felony by statutes in England when committed clandestinely.[496] It is also punished in this country by acts of congress.[497]

477. Fraudulent Bankruptcy.

Another offense against the public trade is fraudulent bankruptcy. It was punished by statute in England as a felony. It consisted in England in the bankrupt's neglect to surrender himself to his creditors, his nonconformity to the directions of the bankruptcy laws, his concealing or embezzling his effects, and his withholding books or writ-

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[495] 4 Bl. Comm. 154.

[496] 4 Bl. Comm. 154, 155.

[497] See Rev. St. U. S. § 3082; U. S. v. Thomas, 4 Ben. 370, Fed. Cas. No. 16,473; U. S. v. Claflin, 13 Blatchf. 184, Fed. Cas. No. 14,798; U. S. v. Fraser, 42 Fed. 140.

ings, with intent to defraud his creditors.[498] In this country, the bankruptcy law of 1898 contains provisions making it a criminal offense to commit certain acts of fraud therein specified.[498a]

478. Usury.

The offense of usury is the act of intentionally taking or reserving by contract a greater compensation or rate of interest for the loan of money than the highest rate of interest allowed by law. In England the rate of interest was first limited by the statute of 37 Hen. VIII. c. 9, to ten per cent., and it was made a misdemeanor to take more. This was followed by other statutes.[499] In this country, also, there are statutes in most states against usury, and some of them, like the English statute, make it a criminal offense. To constitute the offense, the taking of the unlawful interest must be intentional, and not due merely to a mistake.[500]

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[498] 4 Bl. Comm. 156.

[498a] See post, § 513(1).

[499] 4 Bl. Comm. 156.

[500] See Crawford v. State, 2 Ind. 112; Block v. State, 14 Ind. 425. See, also, McAuly v. State, 7 Yerg. (Tenn.) 526.

479. Cheating.

The common-law offense of cheating by the use of false weights and measures, and other deceitful practices affecting the public, was regarded as an offense affecting the public trade, and is so treated by Blackstone.[501] It has already been considered at length in this work in treating of offenses against the property of individuals.[502]

480. Forestalling, Regrating, and Engrossing.

Forestalling the market, regrating, and engrossing were punished in England, both at common law and by statute, as offenses against public trade. *"Forestalling"* the market was described by the statute of 5 & 6 Edw. VI. c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there. *"Regrating"* was described by the same statute to be the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles thereof. *"Engrossing"*

[501] 4 Bl. Comm. 157.

[502] Ante, § 350, et seq.

was described to be the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. And the total engrossing of any other commodity, with an intent to sell it at an unreasonable price, was an indictable offense at common law.[503] These offenses are no longer punished in England, nor are they punished with us, unless there is a combination or conspiracy.[504]

481. Monopolies.

"Monopoly" has been defined in England as a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.[505] And in this country it has been defined as an institution or allowance by a grant from the sovereign power of the state, by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buy-

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[503] 4 Bl. Comm. 158.

[504] Ante, §§ 147-149.

[505] 4 Bl. Comm. 159; 1 Hawk. P. C. 231.

ing, selling, making, working, or using of anything is given.[506] The granting of monopolies is now very generally prohibited by statute. The term "monopoly" has also been used, somewhat in the sense of engrossing, to designate the act of a person or corporation in obtaining the control of a particular commodity, or of a particular industry, without any grant of exclusive rights or privileges by the state. In this sense, like engrossing, it is not now a crime unless there is a combination of several persons to accomplish such an end, in which case the combination may be punishable as a criminal conspiracy.[507]

VII. OFFENSES AGAINST THE LAW OF NATIONS.

482. In General.

Many acts are punished as offenses against the law of nations,—among others, piracy, violation of safe-conducts or passports, and infringement of the rights of ambassadors. The law of nations is that universal law of society which regulates the mutual intercourse between one state and another. Black-

[506] Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 38.

[507] Ante, §§ 147-149.

stone says: "The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle: That different nations ought, in time of peace, to do one another all the good they can, and, in time of war, as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities, in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to

which they are equally subject. In arbitrary states, this law, wherever it contradicts, or is not provided for by, the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. * * * Offenses against this law are principally incident to whole states or nations, in which case recourse can only be had to war, which is an appeal to the God of hosts to punish such infractions of public faith as are committed by one independent people against another; neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live to animadvert upon them with becoming severity, that the peace of the world may be maintained."[508]

[508] 4 Bl. Comm. 66.

In this country, as we have seen, the federal courts have no common-law jurisdiction in criminal matters. They can punish no act until congress has made it a crime, affixed the punishment, and conferred upon them jurisdiction of the offense.[509] Without this, therefore, they could not punish offenses against the law of nations. The power of congress in the matter depends, of course, upon the constitution of the United States. That instrument expressly confers upon congress the power to define and punish piracies and felonies committed on the high seas, "and offenses against the law of nations."[510] This gives congress full power to provide for the punishment of any act whatever which is an offense against the law of nations,[511] and it has exercised this power in a number of cases.

483. Piracy.—Piracy is robbery and depredation upon the high seas. It is an offense against the law of nations, and a felony, punishable by death, except where a different punishment is prescribed by statute.

Piracy has, from the earliest times, been

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[509] Ante, § 12b.

[510] Const. U. S. art. 1, § 8.

[511] See U. S. v. Arjona, 120 U. S. 479.

regarded as a crime against the law of nations. "A pirate is one who roves the sea in an armed vessel, without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason, pirates, according to the law of nations, have always been compared to robbers, the only difference being that the sea is the theater of the operations of one, and the land of the other. And as general robbers and pirates upon the high seas are deemed enemies of the human race, making war upon all mankind indiscriminately, the vessels of every nation have a right to pursue, seize, and punish them."[512] The offense of piracy, by the common law, the law of nations being a part of the common law, "consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to a felony there."[513] Stephen says: "Piracy, by the

[512] Nelson, J., in Trial of Officers of The Savannah, p. 371. See, generally, 4 Bl. Comm. 71; Rex v. Dawson, 13 How. St. Tr. 454.

[513] 4 Bl. Comm. 72.

law of nations, is taking a ship on the high seas, or within the jurisdiction of the Lord High Admiral, from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English county. Whoever commits piracy, by the law of nations, is liable (it seems) to the same punishment as if the act constituting piracy had been committed within the body of an English county."[514] In the United States, as we have seen, the federal constitution expressly authorizes congress to define and punish piracies and felonies on the high seas, and offenses against the law of nations, and, in pursuance of such authority, an act has been passed by congress punishing by death any person who shall commit the crime of piracy "as defined by the law of nations," and who shall be brought into or found in the United States.[515]

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[514] Steph. Dig. Crim. Law, art. 104.

[515] Const U. S. art. 1, § 8; Rev. St. U. S. § 5368 et seq. See U. S. v. Palmer, 3 Wheat. (U. S.)

484. Violation of Safe-Conducts or Passports.

It is an offense against the law of nations to violate safe-conducts or passports expressly granted by the sovereign or chief executive of a nation or his ambassadors to the subjects of a foreign power in time of mutual war, or to commit acts of hostility against such as are in amity, league, or truce, and are in the country under a general implied safe-conduct, and one who committed such an offense was indictable at common law.[516] In this country, under the power to define and punish offenses against the law of nations, congress has passed an act expressly punishing, by imprisonment and fine, any person "who violates any safe-conduct or passport duly obtained or issued under authority of the United States."[517]

485. Infringement of Rights of Ambassadors.

The common law of England recognized to the full extent the rights and privileges of ambassadors as established by the law of na-

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610; U. S. v. Klintock, 5 Wheat. (U. S.) 144; U. S. v. Holmes, 5 Wheat. (U. S.) 412.

[516] 4 Bl. Comm. 68.

[517] Rev. St. U. S. § 4062.

tions, and punished violations thereof.[518] In this country, congress has prescribed a punishment and fine for assaulting, wounding, imprisoning, or in any other manner offering violence to the person of a public minister, "in violation of the law of nations."[519]

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[518] 4 Bl. Comm. 70.

[519] Rev. St. U. S. § 4062. See 2 Whart. Crim. Law, § 1899; U. S. v. Jeffers, 4 Cranch, C. C. 704, Fed. Cas. No. 15,471; U. S. v. Liddle, 2 Wash. C. C. 205, Fed. Cas. No. 15,598; U. S. v. Ortega, 4 Wash. C. C. 531, 11 Wheat. 467, Fed. Cas. No. 15,971.

CHAPTER X.

JURISDICTION AND LOCALITY.

I. JURISDICTION IN GENERAL.

486. General Rule.—A country or state may punish any person, except foreign ambassadors or ministers and their servants, for offenses committed within its limits, but, as a general rule, the laws of a country or state have no operation beyond its territorial limits, and ordinarily, therefore, the courts of a country or state have no jurisdiction to punish for offenses committed beyond such limits.[1]

As we shall see in the course of this chapter, there are some real exceptions to this

[1] Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897; State v. Barnett, 83 N. C. 615; People v. Merrill, 2 Park. Cr. R. (N. Y.) 590; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, Beale's Cas. 398; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407; State v. Wyckoff, 31 N. J. Law, 65, Beale's Cas. 399; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320; State v. Hall, 114 N. C. 909, 41 Am. St. Rep. 822; Johns v. State, 19 Ind. 421, 81 Am. Dec. 408; Phillips v. People, 55 Ill. 429.

rule, and many apparent exceptions. In treating of the subject of jurisdiction, we shall first consider shortly the extent of the territorial limits of a country or state, and particularly of our own country and states, after which we shall consider the power of a nation or state to punish citizens or subjects of other nations or states, and the power to punish offenses by citizens or subjects abroad. We shall then treat of the locality of crimes, and finally of United States and state jurisdiction in criminal matters.

487. Territorial Limits in General.

Since jurisdiction depends to a great extent upon territorial limits, it is often necessary, in criminal prosecutions, to ascertain exactly what the territorial limits of a country, state, or county are. Where two countries or states adjoin on the land, the line between them is fixed by occupancy and treaties in the case of the United States and foreign countries. As between the different states, it is fixed by original colonial grants, by enabling acts of congress, by compacts between the states with the consent of congress, or by suits between states in the supreme court of the United States to ascertain and

establish boundaries. The boundary lines between the different counties of a state are fixed by the statutes of the states.

488. Countries, States, or Counties Bounded by the Sea.

(*a*) *In General.*—It has repeatedly been said by writers on international law that the jurisdiction of a nation bordering on the sea extends not merely to low-water mark on the shore, but into the sea to the distance of a cannon shot, estimated at one marine league, or three miles, from low-water mark; and it has been very generally assumed from this that a nation has jurisdiction to punish offenses against its laws if committed at any place within such limits.[2] Whether this doctrine, however, gives jurisdiction to punish for acts committed at any place within the three-mile limit, in the absence of a statute, has been rendered very doubtful by a late decision in England, in which it was held by the court of criminal appeal, in the absence

[2] See 1 Kent, Comm. 29; 1 Hale, P. C. 154; Com. v. Manchester, 152 Mass. 230, 23 Am. St. Rep. 820, Beale's Cas. 930; Manchester v. Massachusetts, 139 U. S. 240. And see 11 Am. Law Rev. 625 et seq.

of any statute covering the case, that an indictment for manslaughter would not lie against the master of a German vessel, who was himself a German subject, for negligently running into and sinking an English ship, and causing the death of an English subject thereon, though the collision and death occurred within three miles of the shores of England. A majority of the court held that the *territorial limits* of a nation do not extend beyond low-water mark on the shore; that, though a nation has a *quasi* jurisdiction over the sea for a distance of three miles from the shore for the purpose of military and police regulations, this part of the sea is no part of its territory; and that, in the absence of legislation on the subject, its courts have no jurisdiction to take cognizance of and punish an act committed there by a foreigner on a foreign ship.[3] Since this decision, a statute has been enacted in England extending the admiralty jurisdiction in criminal matters, and the jurisdiction of the central criminal court, to which such jurisdic-

[3] Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, 46 L. J. Mag. Cas. 17, Beale's Cas. 897. And see U. S. v. Kessler, Baldw. 15, Fed. Cas. No. 15,528.

tion has been transferred, to the distance of a marine league into the sea.[4]

In this country, also, statutes to this effect have been enacted and upheld. In Massachusetts it was held that the territorial jurisdiction of the state over the adjacent seas, subject to the common right of navigation, extends to the distance of at least a marine league from the shore, and over bays running into the state which do not exceed in width two marine leagues at the mouth, and a statute regulating fisheries in such waters, and punishing violations of its provisions, was upheld.[5] This decision was affirmed by the supreme court of the United States.[6]

(*b*) *Bays and Other Arms of the Sea.*—When a river, haven, bay, or other arm of the sea, extends into a country or state, it is not only within the territorial limits of the country or state to an imaginary line drawn between the furthermost points of land, or *fauces terrae,* but it is also with the body of

[4] 41 & 42 Vict. c. 73.

[5] Com. v. Manchester, 152 Mass. 230, 23 Am. St. Rep. 820, Beale's Cas. 930. In this case, Buzzard's Bay was held to be within the territorial jurisdiction of Massachusetts.

[6] Manchester v. Massachusetts, 139 U. S. 240.

a county of the state, and subject to the common-law jurisdiction, if it is so narrow that a person standing on one shore can reasonably discern by the naked eye what is being done on the other shore.[7] According to this doctrine it has been held that the county of Suffolk, in Massachusetts, extends to all the waters of Boston harbor between the circumjacent islands down to Great Brewster Island and Point Allerton, and that the courts of such county have jurisdiction of offenses against the laws of the state committed on a vessel lying in such waters.[8]

(*c*) *Long Island Sound.*—The waters of Long Island sound are "high seas," within the meaning of the federal constitution and acts of congress, except such parts as are within the *fauces terrae.*[9] Within the *fauces terrae,* as in the Huntington and Northport bays, and in New Haven harbor, but not

[7] 1 Kent, Comm. 30; U. S. v. Bevans, 3 Wheat. (U. S.) 336; U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; Com. v. Peters, 12 Metc. (Mass.) 387; Manley v. People, 7 N. Y. 295.

[8] U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268, per Mr. Justice Story.

[9] U. S. v. Jackalow, 1 Black (U. S.) 484; U. S. v. Peterson, 64 Fed. 145, 147.

outside, such waters are within the territorial limits and jurisdiction of the states of New York and Connecticut, and within the body of the counties thereof.[10]

489. Rivers and Lakes.

(*a*) *In General.*—The jurisdiction of a state extends over all rivers and lakes lying within its territorial limits, unless there is some compact to the contrary.[11] Its jurisdiction over a river forming the boundary between it and another state depends, in the absence of any compact, upon whether its territorial limits extend to the middle of the stream, or to the one or the other of the banks. When a great river is the boundary between two states, if the original property was in neither state, and there is no convention respecting it, each holds to the middle of the stream. But when one state was the original proprietor, and has granted the territory on one side only, it retains the river within its own domain, and the newly-crea-

[10] Manley v. People, 7 N. Y. 295.

[11] Biscoe v. State, 68 Md. 294; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

ted state extends only to the low-water mark on the river.[12]

(*b*) *Hudson River.*—Although, for some purposes, New Jersey is bounded by the middle of the Hudson river, and the state owns the land under the water to that extent, exclusive jurisdiction, not only over the water, but also over the land, to low-water mark on the New Jersey shore, is granted to, or rather acknowledged to belong to, the state of New York by the compact between those states, and it has been held, therefore, that the courts of New Jersey have no jurisdiction to punish as a nuisance the obstruction of the river by placing vessels and wrecks on the shore below the low-water line.[13]

(*c*) *Mississippi River—Wisconsin and Minnesota.*—The enabling act admitting Wisconsin into the Union provided that the state should have concurrent jurisdiction on the Mississippi and other rivers on its borders forming a common boundary between it

[12] Chief Justice Marshall in Handly's Lessee v. Anthony, 5 Wheat. (U. S.) 374; Booth v. Shepherd, 8 Ohio St. 243; Com. v. Garner, 3 Grat. (Va.) 655; McFall v. Com., 2 Metc. (Ky.) 394.

[13] State v. Babcock, 30 N. J. Law, 29.

and any other states then or thereafter bounded by such rivers, and the subsequent enabling act of Minnesota contained a similar provision as to the jurisdiction of that state. Under these acts it was held that Minnesota had jurisdiction, concurrent with the jurisdiction of Wisconsin, of an offense committed on the bridge across the Mississippi river at Winona, though committed beyond the middle of the bridge.[14]

Illinois and Iowa.—Between Iowa and Illinois the boundary is the middle of the Mississippi river, and neither state has jurisdiction beyond such line.[15]

(*d*) *The Great Lakes.*—It has been held by the supreme court of the United States that the great lakes in this country are within the general designation of "high seas" in the federal constitution and acts of congress, and it was therefore held that the federal courts had jurisdiction of an offense committed on an American vessel in the Detroit river beyond the boundary line between the United States and Canada.[16] By an act of congress

[14] State v. George, 60 Minn. 503.

[15] Phillips v. People, 55 Ill. 429.

[16] U. S. v. Rodgers, 150 U. S. 249. And see U. S. v. Peterson, 64 Fed. 145.

of 1890, the criminal jurisdiction of the federal courts was expressly extended over the Great Lakes and connecting waters.[17] The limits of the states on the Great Lakes extend to the center of the lakes.[18]

490. Vessels of a Nation as a Part of its Territory.

(*a*) *In General.*—With respect to offenses committed on vessels, it is settled beyond any question that the admiralty jurisdiction of a nation extends over vessels sailing under its flag, while they are on the high seas, for the vessels of a nation are, as "floating islands" would be, a part of its territory.[19] "By the received law of every nation, a ship on the

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[17] Act Sept. 4, 1890 (26 Stat. p. 424, c. 874); U. S. v. Peterson, 64 Fed. 145.

[18] U. S. v. Peterson, 64 Fed. 145, 147; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[19] 1 Kent, Comm. 26; Reg. v. Anderson, L. R. 1 C. C. 161, 11 Cox, C. C. 198, Beale's Cas. 895; Reg. v. Lopez, Dears. & B. C. C. 525, 7 Cox, C. C. 431; Reg. v. Lesley, Bell, C. C. 220, 8 Cox, C. C. 269, Beale's Cas. 311; Reg. v. Carr, 10 Q. B. Div. 76, 15 Cox, C. C. 129, 52 L. J. Mag. Cas. 12, 47 Law Times (N. S.) 451; Reg. v. Armstrong, 13 Cox, C. C. 184; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

high seas carries its nationality and the law of its own nation with it, and in this respect has been likened to a floating portion of the national territory. All on board, therefore, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on its territory on land, and are liable to the penalties of that law for any offense committed against it." [20] The same is true of the vessels of a nation when they are in the ports or navigable waters of another nation.[21]

(*b*) *Concurrent Jurisdiction of Other Nations.*—The fact that a nation has jurisdiction over its vessels while they are in the ports or navigable waters of another nation does not, in the absence of treaty provisions, exclude the jurisdiction of the other nation. The latter has concurrent jurisdiction. "It is part of the law of civilized nations that,

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[20] Per Cockburn, C. J., in Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403.

[21] Reg. v. Anderson, L. R. 1 C. C. 161, 11 Cox, C. C. 198, Beale's Cas. 895; Rex v. Allen, 7 Car. & P. 664, 1 Mood. C. C. 494; U. S. v. Gordon, 5 Blatchf. 18, Fed. Cas. No. 15,231. And see U. S. v. McGlue, 1 Curt. 1, Fed. Cas. No. 15,679; U. S. v. Armstrong, 2 Curt. 446, Fed. Cas. No. 14,467.

when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement,"[22] for, as was said by Chief Justice Marshall, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." [23] Thus, if a seaman on a British vessel should kill another seaman while the vessel is in a port of the United States, or *vice versa*, either nation would have jurisdiction to punish him for murder, without regard to his nationality.[24]

[22] Wildenhus' Case (Mali v. Keeper of Jail), 120 U. S. 1, Beale's Cas. 925; Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897; Reg. v. Cunningham, Bell, C. C. 72, 8 Cox, C. C. 104.

[23] The Exchange, 7 Cranch (U. S.) 116.

[24] Reg. v. Keyn, supra; Wildenhus' Case (Mali v. Keeper of Jail), supra; and other cases cited above.

491. Jurisdiction over Foreigners.

(*a*) *In General.*—As a general rule, foreigners residing or being in a country are subject to its laws, and are just as much liable to indictment for offenses committed against its laws as citizens are.[25] This principle applies to foreigners committing crimes upon vessels sailing under the flag of a country, whether the vessel is on the high seas, or in the ports or navigable waters of another country, for the vessels of a country, as we have seen, are a part of its territory.[26]

(*b*) *Ambassadors and Consuls.* — This rule does not apply to foreign ambassadors or ministers and their retinue. By the law of nations, they cannot be arrested or punish-

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[25] Reg. v. McCafferty, Ir. R. 1 C. L. 363, 10 Cox, C. C. 603; U. S. v. Wiltberger, 5 Wheat. (U. S.) 97; In re Wolf, 27 Fed. 606; People v. McLeod (N. Y.) 25 Wend. 483, 1 Hill, 377, 37 Am. Dec. 328; Com. v. Blodgett, 12 Metc. (Mass.) 56; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452. And see State v. Knight, Tayl. (N. C.) 65, 2 Hayw. 109, Beale's Cas. 406.

[26] Reg. v. Anderson, L. R. 1 C. C. 161, 11 Cox, C. C. 198, Beale's Cas. 895; Reg. v. Lopez, Dears. & B. C. C. 525, 7 Cox, C. C. 431; Reg. v. Carr, 10 Q. B. Div. 76, 15 Cox, C. C. 129, 52 L. J. Mag. Cas. 12, 47 Law Times (N. S.) 451; ante, § 490.

ed for offenses committed in the country to which they are deputed.[27] This is not true, however, of foreign consuls.[28]

(*c*) *Belligerents.*—It is settled that, in time of war, a belligerent who commits in a country or state acts which would, under ordinary circumstances, be punishable as a crime against its laws, is not punishable therefor in the civil courts, but must be treated as a prisoner of war only.[29] This principle was applied during the late Civil War in this country.[30] It seems that, even in time of peace, a subject of one of two foreign sovereigns who are at war is not punishable in our courts for illegal acts in our territory, if he is an officer or functionary of the foreign sovereign, or if the foreign sovereign adopts his act, but we must seek redress from the foreign sovereign.[31]

(*d*) *Offenses by Foreigners Abroad.*—Unless jurisdiction is conferred by some

[27] 1 Kent, Comm. 39; Respublica v. De Longchamps, 1 Dall. (Pa.) 111; U. S. v. Lafontaine, 4 Cranch. C. C. 173, Fed. Cas. No. 15,550; State v. De La Foret, 2 Nott & McC. (S. C.) 217.

[28] State v. De La Foret, 2 Nott & McC. (S. C.) 217.

[29] 1 Whart. Crim. Law, § 283.

[30] Id., citing The Emulous, 1 Gall. 563, Fed. Cas.

statute, the courts of a state or country have no jurisdiction to punish a citizen or subject of another state or country for an offense committed beyond its territorial limits, unless the act takes effect and constitutes an offense within such limits.[32] Nor, according to the better opinion, can the legislature of a state punish acts committed by foreigners abroad, where the act does not take effect and constitute an injury and offense within its territorial limits. This was decided in an early North Carolina case, in which it was held that the legislature could not punish the counterfeiting of its bills of credit by citizens of Virginia in Virginia. "This state," said the court, "cannot declare

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No. 4,479; Com. v. Blodgett, 12 Metc. (Mass.) 56; People v. McLeod (N. Y.) 25 Wend. 483, 1 Hill, 377, 37 Am. Dec. 328.

[31] See Coleman v. State of Tennessee, 97 U. S. 509; Com. v. Holland, 1 Duv. (Ky.) 182; Hammond v. State, 3 Cold. (Tenn.) 129.

[32] Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897; U. S. v. Palmer, 3 Wheat. (U. S.) 610; People v. Merrill, 2 Park. Cr. R. (N. Y.) 590; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

that an act done in Virginia by a citizen of Virginia shall be criminal and punishable in this state. Our penal laws can only extend to the limits of this state, except as to our own citizens."[33] The principle has also been recognized in other states.[34] In Texas there is a decision apparently to the contrary. A statute of that state punishing any person who, out of the state, should commit an offense punished by the laws of the state, and not requiring personal presence, was held valid, and it was held that it applied to and rendered punishable forgery in another state of instruments affecting the title to lands in Texas.[35] Congress has enacted a statute punishing perjury or subornation of perjury before United States secretaries of legation and consular officers without express restriction to citizens of the United States.[36] It

[33] State v. Knight, Tayl. (N. C.) 65, 2 Hayw. (N. C.) 109, Beale's Cas. 406.

[34] People v. Merrill, 2 Park. Cr. R. (N. Y.) 590; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407. And see Reg. v. Lewis, Dears. & B. C. C. 182, 7 Cox, C. C. 277; State v. Kelly, 75 Me. 331, 49 Am. Rep. 620.

[35] Hanks v. State, 13 Tex. App. 289.

[36] See Rev. St. U. S. § 4083 et seq.

seems never to have been decided whether this statute applies to foreigners, or, if so, whether it is valid; but when the question does arise it will very probably be held that it was not intended to apply to foreigners.[37]

Homicide.—In England there is a statute punishing for homicide and giving the English courts jurisdiction, where a person is feloniously stricken, poisoned, or otherwise hurt on the high seas, or in any other place outside of England, and dies, by reason of the injury, in England. There are similar statutes in the United States. These statutes are undoubtedly valid as applied to homicide committed by subjects or citizens of England or of the state, as the case may be.[38] In England it has been held that the statute only applies where the homicide is committed by a British subject.[39] In this country it has been held in New Jersey that a statute

[37] See Reg. v. Lewis, Dears. & B. C. C. 182, 7 Cox, C. C. 277; State v. Knight, Tayl. (N. C.) 65, 2 Hayw. (N. C.) 109, Beale's Cas. 406.

[38] Reg. v. Conolly, cited in Dears. & B. C. C. 183; Reg. v. Azzopardi, 1 Car. & K. 203, 2 Mood. C. C. 289.

[39] Reg. v. Lewis, Dears. & B. C. C. 182, 7 Cox, C. C. 277.

is not within the power of the legislature, as applied to homicide committed by foreigners or citizens of other states.[40] But in Massachusetts such a statute was held constitutional, and applicable to a homicide by a foreigner and a citizen of another state, who inflicted the injury upon the deceased in a British ship on the high seas.[41]

Effect of Statutes.—In England, if parliament enacts laws punishing acts by foreigners abroad, the courts must give them effect, whether parliament ought to have enacted them or not, and leave it for the government to settle the question of international law with other nations.[42] In this country, state statutes undertaking to punish for crimes committed in other states by citizens of such other states have been held void.[43]

[40] State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407. And see State v. Kelly, 76 Me. 331, 49 Am. Rep. 620. But see Hunter v. State, 40 N. J. Law, 495.

[41] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89, Beale's Cas. 409. And see People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[42] Per Cockburn, C. J., in Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897.

[43] State v. Knight, Taylor (N. C.) 65, 2 Hayw.

Acts Without, Taking Effect Within, a Country or State.—A country or state may punish acts of citizens of other states and foreigners committed in fact outside of its territorial limits, if they take effect and constitute an injury to its own citizens or subjects within its limits.[44] Thus, a state may punish a person for advising and procuring a woman, within its limits, to take a drug with intent to cause an abortion, though the drug may be procured in another state, and sent to the woman by mail.[45] In like manner, a state may punish for acts done in another state, which take effect and constitute a nuisance within its limits.[46] And it may punish a man, if it can obtain jurisdiction of his person, for murder committed by shooting across the line from another state,[47] or for committing a crime within its limits by means of an innocent agent.[48] In these

(N. C.) 109, Beale's Cas. 406; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407.

[44] See Holmes v. Jennison, 14 Pet. (U. S.) 540.

[45] State v. Morrow, 40 S. C. 221.

[46] Post, § 510.

[47] See State v. Hall, 114 N. C. 909, 41 Am. St. Rep. 822.

[48] Post, § 497.

cases, however, the offense is, in contemplation of the law, committed within the state.[49] In an Indiana case it was said: "While it is clear that the criminal law of a state can have no extraterritorial operation, it is equally clear that each state may protect her own citizens in the enjoyment of life, liberty, and property, by determining what acts within her own limits shall be deemed criminal, and by punishing the commission of those acts. And the right of punishment extends not only to persons who commit infractions of the criminal law *actually* within the state, but also to all *persons who commit* such infractions as are, in *contemplation of law*, within the state."[50]

492. Jurisdiction over Subjects or Citizens Abroad.

In the absence of legislation on the subject, the courts of a state or nation have no jurisdiction to punish offenses committed by its subjects or citizens in another state or country.[51] Thus, where a citizen of North Caro-

[49] Post, § 494, et seq.

[50] Johns v. State, 19 Ind. 421, 81 Am. Dec. 408. And see People v. Adams, 3 Denio (N. Y.) 190, 45 Am. Dec. 468, 1 N. Y. 173.

[51] U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No.

lina, while standing on the North Carolina side of the line between that state and Tennessee, shot across the line and killed a man in Tennessee, it was held that the murder was committed in Tennessee, and the North Carolina courts had no jurisdiction.[52] So, where a citizen of the United States, on board a United States merchant vessel in a foreign port, shot at and killed a person on board a foreign vessel, it was held that the homicide was committed on board the foreign vessel, and the federal courts of this country had no jurisdiction to punish therefor.[53]

It is well settled, however, that a nation has the power to prohibit and punish acts by its own subjects or citizens while they are in a foreign state or country, if the legislature sees fit to do so.[54] For the United States to

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14,932, Beale's Cas. 398; State v. Hall, 114 N. C. 909, 41 Am. St. Rep. 822; People v. Merrill, 2 Park. Cr. R. (N. Y.) 590; In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562; Musgrave v. Medex, 19 Ves. 652; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320.

[52] State v. Hall, supra.

[53] U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, Beale's Cas. 398.

[54] 1 Whart. Crim Law, §§ 273, 285, note; Com.

do so, it has been held, does not violate the provision of the federal constitution entitling a person accused of a crime to a trial in the state and district in which it was committed, for this provision only applies to offenses committed within the United States.[55]

Acts of Congress.—The power to punish acts committed in foreign countries has been recognized by congress. Statutes have been enacted giving ministers and consuls of the United States, in pursuance of treaties with China, Japan, and certain other countries, jurisdiction to arraign and try, in the manner therein provided, all citizens of the United States charged with offenses against law, committed in such countries,[56] and giving like jurisdiction to consuls and commercial agents of the United States at islands or in

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v. Gaines, 2 Va. Cas. 172; U. S. v. Dawson, 15 How. (U. S.) 467; State v. Main, 16 Wis. 398.

In England, a statute punishes the murder of one British subject by another, though committed in a foreign country. 9 Geo. IV. c. 31, § 7; Rex v. Sawyer, Russ. & R. 294; Reg. v. Azzopardi, 2 Mood. C. C. 289, 1 Car. & K. 203.

[55] U. S. v. Dawson, 15 How. (U. S.) 467.

[56] Rev. St. § 4084. See In re Stupp, 11 Blatchf. 124, Fed. Cas. No. 13,562.

countries not inhabited by any civilized people, or recognized by any treaty with the United States.[57] Another act punishes any citizen of the United States, though residing or abiding in a foreign country, who shall, without the permission or authority of the United States, "directly or indirectly commence or carry on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or any officer or agent thereof, in relation to any disputes or controversies with the United States."[58] Another statute punishes correspondence with rebels, though the offense may be committed in a foreign country.[59] Another statute punishes perjury or subornation of perjury abroad before secretaries of legation and consular officers, and forgery of consular papers.[60]

[57] Rev. St. § 4088.

[58] Id. § 5335.

[59] Act Cong. Feb. 26, 1863.

[60] Rev. St. § 4083 et seq.

II. LOCALITY OF OFFENSES.

493. In General.

The chief difficulty in determining whether a country or state has jurisdiction to take cognizance of and punish an offense is in determining the locality of offenses. An offense is committed, of course, where the act constituting the offense is committed, and ordinarily, therefore, the locality of offenses is clear. In some cases, however, it is otherwise. Thus, if a man stands in one state, and kills another by shooting across the line into another state, or if he wounds a person in one state, and the victim dies in another, or if a man steals goods in one state, and carries them into another, or if he does an act in one state, which takes effect and constitutes a crime in another,—in these and many other cases, difficulty has been experienced in determining the locality of the offense.

494. Act Committed in One Jurisdiction and Taking Effect in Another.

To render one guilty of an offense in a particular jurisdiction, it is not always necessary that he shall be personally within such jurisdiction at any time. A person who, in

one jurisdiction, does an act which takes effect and constitutes a crime in another, may be punished in the latter jurisdiction,[61] if he can be apprehended therein.[62] And a per-

[61] Rex v. Brisac, 4 East, 164; Reg. v. Jones, 1 Den. C. C. 551, 4 Cox, C. C. 198; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Simpson v. State, 92 Ga. 41, 44 Am. St. Rep. 75; Johns v. State, 19 Ind. 421; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932, Beale's Cas. 398; Ex parte Hedley, 31 Cal. 109; State v. Morrow, 40 S. C. 221; Robbins v. State, 8 Ohio St. 131; State v. Hall, 114 N. C. 909, 41 Am. St. Rep. 822.

[62] Of course he cannot be punished if he cannot be apprehended, and if he does not come within the state in which his act takes effect, there is no way in which he can be apprehended without the consent of the country or state in which he is. The act of congress relating to interstate rendition of fugitives from justice does not apply, for it only applies to persons who flee from justice, and a person who has never been in a state cannot be a fugitive from its justice. A short time ago, a man stood in North Carolina, and, by shooting across the line, killed a man in Tennessee. He was tried for murder in North Carolina, and acquitted on the ground that the homicide was committed in Tennessee, where the shot took effect. The authorities of Tennessee afterwards applied for his surrender by the governor, but the demand was refused, on the ground that he was not a fugitive from the justice of Tennessee, as he

son who commits a crime in one jurisdiction, for which he may be there punished, is liable for its continuous operation in another jurisdiction, if he can be apprehended in the latter.[63] We shall see the application of this principle in considering the locality of particular offenses. We shall see, for example, that it applies where a man in one state shoots across the line, and kills or wounds a man in another state,[64] or assaults him,[65] where a man in one state sends a letter containing false pretenses by mail to another state, and there obtains money or property by means of such pretenses,[66] where a man erects a nuisance in one state, and it also takes effect and constitutes a nuisance in another state,[67] or publishes a libel in one state in a newspaper

had not been in that state. State v. Hall, 114 N. C. 909, 41 Am. St. Rep. 822; State v. Hall, 115 N. C. 811, 44 Am. St. Rep. 501.

[63] 2 Hawk. P. C. c. 25, § 37; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

[64] State v. Hall, 114 N. C. 909, 41 Am. St. Rep. 822; post, § 505 c.

[65] Simpson v. State, 92 Ga. 41, 44 Am. St. Rep. 75; post, § 507.

[66] Reg. v. Jones, 1 Den. C. C. 551, 4 Cox, C. C. 198; post, § 501.

[67] 2 Hawk. P. C. c. 25, § 37; post, § 510.

which circulates in another state,[68] where a man commits a crime in another state by means of an innocent agent,[69] and in many other cases.

495. Accessaries.

(*a*) *Different Counties.*—When a felony was committed in one county of England, and a person was accessary before or after the fact in another county, it was uncertain, at common law, whether he could be punished in either county. Sir Matthew Hale said: "If a man were accessary before or after in another county than where the principal felony was committed, at common law it was dispunishable."[70] Other writers were of opinion that the accessary might be punished where the felony was committed.[71] The question was finally set at rest by the statute

[68] Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; post, § 508.

[69] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; People v. Adams, 3 Denio (N. Y.) 190, 1 N. Y. 173; post, § 497.

[70] 1 Hale, P. C. 623; 2 Hale, P. C. 163. The reason was that it was thought that a grand jury of one county could not take cognizance of the acts in the other. 2 Hale, P. C. 163.

[71] 1 East, P. C. 360.

of 2 & 3 Edw. VI. c. 24, § 4, making accessaries liable to indictment in the county in which they should become accessary.[72] This statute is old enough to have become a part of our common law, but in many states similar statutes have been enacted. Under these statutes, the prosecution must be in the county in which the accused became accessary.[73]

(*b*) *Different States.*—In Connecticut it has been held that a person who, while in another state, becomes accessary to a felony committed in Connecticut, may be punished as accessary in Connecticut, if he can be apprehended,[74] but the decision is not supported by any authority whatever, and cannot be sustained. A person who, in one state, becomes accessary, either before or after the fact, to a felony committed by the principal in another state, is guilty of a crime in the state in which he becomes accessary, and may be punished there, but he is not guilty as an

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[72] See 1 Hale, P. C. 623.

[73] See Baron v. People, 1 Park. Cr. R. (N. Y.) 246; Tully v. Com., 13 Bush (Ky.) 142, 151; Com. v. Pettes, 114 Mass. 307.

[74] State v. Grady, 34 Conn. 118. See, also, State v. Ayers, 8 Baxt. (Tenn.) 96.

accessary, and cannot be punished as such, unless by express statutory provision, in the state in which the felony is committed.[75] As the principal is a guilty agent, the doctrine in relation to crimes committed by means of an innocent agent does not apply.[76] In some states, jurisdiction to punish in such cases is expressly conferred by statute, and such statutes are undoubtedly valid. Where a statute provided that "every person, being without the state, committing or consummating an offense by an agent, or means within the state," should be liable to punishment by the laws thereof in the same manner as if he were present, and had commenced and consummated the offense within the state, it was held that it applied only where a person out of the state should commit a crime which, in legal contemplation, could be deemed as having been committed within the state under cir-

[75] Johns v. State, 19 Ind. 421, 81 Am. Dec. 408; State v. Wyckoff, 31 N. J. Law, 65, Beale's Cas. 399; State v. Moore, 26 N. H. 448; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452.

[76] Post, § 497.

cumstances which would make him a principal in the crime, and that it did not render punishable in the state one who, in another state, became accessary to a felony committed within the state.[77]

496. Parties Concerned in Misdemeanors.

In misdemeanors, all who are concerned are principals, whether present or absent, and therefore one who, while in one jurisdiction, commits a misdemeanor by means of an agent in another jurisdiction, even when the agent is not an innocent agent, is guilty of the offense in the latter jurisdiction, and may be punished there if he can be apprehended. In contemplation of law, he is present where the offense is committed.[78] This is true, for example, when a person procures the publication of a libel in another jurisdiction,[79] or induces another to commit perjury in another jurisdiction,[80] or to unlawfully sell lot-

[77] Johns v. State, 19 Ind. 421, 81 Am. Dec. 408.

[78] Rex v. Brisac, 4 East, 164; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214. And see State v. Grady, 34 Conn. 118.

[79] Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

[80] See Com. v. Smith, 11 Allen (Mass.) 243.

tery tickets.[81] On the same principle, an employe of a seller of intoxicating liquors in one state, who there receives an order for such liquors from a person in another state, in which the sale of intoxicating liquors is a misdemeanor, having authority from his employer to receive or reject orders, and who accepts the order, and sends the liquors by another employe to the buyer, may be indicted in the state into which the liquors are thus sent.[82] Conspiracy is a misdemeanor, and, where a conspiracy is entered into in one state to commit a felony or a misdemeanor in another, all the conspirators may be indicted *for the conspiracy* in the latter state, if an overt act is done by any one of them in that state.[83]

497. Acts Committed by Means of an Innocent Agent.

As we have seen, one who commits a crime by means of an innocent agent is himself guilty as the principal in the first degree.[84] And, in contemplation of the law, he is per-

[81] Com. v. Gillespie, 7 Serg. & R. (Pa.) 469.

[82] Com. v. Eggleston, 128 Mass. 408.

[83] Rex v. Brisac, 4 East, 164; post, § 498.

[84] Ante, § 168.

sonally present and commits the crime, by means of such agent, in the jurisdiction in which it is actually committed.[85] In accordance with this principle, a person who, while in one jurisdiction, procures poison to be administered in another jurisdiction by an innocent agent, and thereby causes a death, is guilty of murder as principal in the jurisdiction in which the poison is administered.[86] The same is true where a person in one jurisdiction utters a forged instrument, or obtains money by false pretenses, by means of an innocent agent in another jurisdiction.[87] And in those states in which it is held, or provided by statute, that the carrying into one

[85] Reg. v. Garrett, Dears. C. C. 232, 6 Cox, C. C. 260; Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404; Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; Com. v. Hill, 11 Mass. 136; Bishop v. State, 30 Ala. 34; State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452. See Ex parte Hedley, 31 Cal. 109.

[86] See Robbins v. State, 8 Ohio St. 131; State v. Morrow, 40 S. C. 221.

[87] Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404; People v. Adams, 3 Denio (N. Y.) 190, 1 N. Y. 173; Com. v. Hill, 11 Mass. 136; Bishop v. State, 30 Ala. 34. And see Reg. v. Garrett, Dears. C. C. 232; 6 Cox, C. C. 260.

state of goods stolen in another is larceny in the latter, a person who steals goods in one state, and sends them into another state by an innocent agent, is himself guilty of larceny in the latter state.[88] One who receives the goods in such state from the innocent agent, knowing that they have been stolen, receives them, in contemplation of law, from the original thief, and is guilty of receiving stolen goods.[89]

498. Conspiracy.

Since the gist of the offense of conspiracy is the conspiring or agreement, and no overt act is necessary,[90] the offense is committed in the state or country in which the conspiracy is formed, and is indictable there, although it may be to commit a crime in another country or state.[91] All the conspirators, if they can be apprehended, are also indictable for the conspiracy in the other state, whether the

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[88] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[89] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[90] Ante, §§ 132, 133.

[91] Thompson v. State, 106 Ala. 67; Bloomer v. State, 48 Md. 521. And see State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452.

conspiracy is to commit a felony or a misdemeanor, if any one of them does an overt act in the other state in pursuance of the conspiracy, since the agreement or conspiring is renewed or continued in such state as to all the conspirators, whether actually present or not.[92] It was said in substance in a New York case: The law considers that, wherever the conspirators act, they there renew, or, to speak more properly, continue, their agreement, and this agreement is renewed or continued as to all wherever any one of them does an act in pursuance of their common design.[93] In such a case, if the conspiracy was to commit a felony, and the overt act was a felony, the indictment against the parties who were not in the state must be, not for the overt act or felony, but for the conspiracy, for, by the weight of authority, as we have seen, an accessary in one state to a felony committed in another cannot be indicted as

[92] Rex v. Brisac, 4 East, 164; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; Com. v. Corlies, 3 Brewst. (Pa.) 575; U. S. v. Newton, 52 Fed. 275, 283; Noyes v. State, 41 N. J. Law, 418; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469.

[93] People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

accessary in the latter.[94] If the conspiracy was to commit a misdemeanor only, and the overt act was a misdemeanor, the indictment against all the parties, whether present or absent, may be either for the conspiracy or for the overt act, since in misdemeanors all are principals.[95]

499. Larceny.

(*a*) *In General.*—To constitute the offense of larceny in a particular country, state, or county, every essential element of the offense must exist there,—a taking, an asportation, and the felonious intent. If any one is wanting, the crime cannot be committed. Difficult questions arise when goods are taken in one country, state, or county, and carried into another.

(*b*) *Taking in One County and Carrying into Another.*—In England, both at common law and by express statutory provision, if goods are taken in one county, and carried into another, *animo furandi,* it is larceny in

[94] State v. Wyckoff, 31 N. J. Law, 65, Beale's Cas. 399; Johns v. State, 19 Ind. 421, 81 Am. Dec. 408; ante, § 495.

[95] Com. v. Gillespie, 7 Serg. & R. (Pa.) 469; ante, § 496.

the latter as well as in the former, and the thief may be prosecuted in either.[96] The same is true in this country when goods are stolen in one county of a state, and carried into another county of the same state.[97] The reason is that the carrying in the county into which the goods are taken is a continuance of the original trespass, so that there is in that county a taking, an asportation, and a felonious intent.[98] The fact that a long time

[96] Anon., Year Book 7 Hen. IV. 43, pl. 9, Beale's Cas. 595; Anon., Year Book 4 Hen. VII. 5, pl. 1. Beale's Cas. 596; 3 Inst. 113; 1 Hale, P. C. 507, 536; 4 Bl. Comm. 305; Rex v. Parkin, 1 Mood. C. C. 45; Rex v. Smith, Ryan & M. 295. It is now so provided in England by the statute of 24 & 25 Vict. c. 96, § 114.

[97] Com. v. Dewitt, 10 Mass. 154; Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455; Haskins v. People, 16 N. Y. 344; Johnson v. State, 47 Miss. 671; State v. Douglas, 17 Me. 193, 35 Am. Dec. 248; Myers v. People, 26 Ill. 173; Com. v. Cousins, 2 Leigh (Va.) 708; Powell v. State, 52 Wis. 217; State v. Price, 55 Kan. 606; People v. Mellon, 40 Cal. 648; State v. Johnson, 2 Ore. 115; State v. Brown, 8 Nev. 208.

Statutes allowing prosecution in either county are constitutional. State v. Price, 55 Kan. 606.

[98] Ante, § 320; 1 Hale, P. C. 507; Watson v. State, 36 Miss. 593; State v. Somerville, 21 Me. 14, 19.

elapses between the original theft and the carrying of the goods into the other county does not make it any the less larceny in the latter.[99] The principle applies as well to the taking of property which is made the subject of larceny by statute, as outstanding crops, fixtures, and choses in action, for example, as it does to property which is the subject of larceny at common law.[100] It also applies when

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[99] Rex v. Parkin, 1 Mood. C. C. 45.

[100] Rex v. Parkin, 1 Mood. C. C. 45; Com. v. Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455.

In Reg. v. Newland, 2 Cox, C. C. 283, it was held that a man who kills an animal in one county, and carries the carcass into another county, is guilty of stealing, taking, and driving away the animal in the latter county; but that a man who kills an animal in one county, and carries the carcass into another, is not guilty of killing the animal with intent to steal it in the latter county.

The fact that goods stolen by a person in one county, and brought into another, were so brought by accomplices of the original thief, and not by the original thief personally, does not prevent his indictment in the latter county if he is afterwards personally concerned there in the custody or disposal of them. Com. v. Dewitt, 10 Mass. 154.

Sending stolen goods by railway to a confederate in another county has been held a larceny

goods are altered in their character before being carried from one county into another, but in such a case the larceny in the latter county is of the goods in their new state, and they must be so described in the indictment.[101] The larceny is regarded as committed, for the purposes of the prosecution, in the county in which the prosecution is instituted, and the indictment must so allege, instead of alleging the offense in the county in which the property was originally stolen.[102]

(*c*) *Taking in One Country and Carrying*

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in that county, on the ground that the constructive possession remains in the thief. Reg. v. Rogers, L. R. 1 C. C. 136, 11 Cox, C. C. 38.

[101] 2 Russ. Crimes, 328; Rex v. Edwards, Russ. & R. 497; Rex v. Halloway, 1 Car. & P. 127; Com. v. Beaman, 8 Gray (Mass.) 497; State v. Somerville, 21 Me. 14, 19.

This rule has been applied, for example, to stealing live birds or animals in one county or state, and carrying them into another county or state after killing them, Rex v. Edwards, supra; Com. v. Beaman, supra; and to the stealing of a brass furnace in one county, and carrying it into another county after breaking it to pieces, Rex v. Halloway, supra.

[102] Johnson v. State, 47 Miss. 671. And see post, note 111.

into Another, or Taking on the High Seas.— In England it is settled at common law that the doctrine that stealing goods in one county, and carrying them into another, is larceny in the latter, does not apply when goods are stolen in one country, and carried into another, or where goods are stolen on the high seas, and carried into a country, for in such a case the original taking is not a felony of which the common law can take cognizance.[103] This distinction has been recognized where goods have been stolen in a foreign country, and brought into one of our states,[104] though there are several decisions to the con-

[103] Butler's Case, 3 Inst. 113, 13 Coke, 53; Rex v. Prowes, 1 Mood. C. C. 349, Beale's Cas. 597; Reg. v. Carr, 15 Cox, C. C. 131, note, Beale's Cas. 774; Rex v. Anderson, 2 East, P. C. 772; Reg. v. Debruiel, 11 Cox, C. C. 207.

[104] Thus, in the leading case of Com. v. Uprichard, 3 Gray (Mass.) 434, 63 Am. Dec. 762, where goods had been stolen in Nova Scotia, and brought into Massachusetts, it was held that an indictment would not lie for larceny in Massachusetts. See, also, Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; Stanley v. State, 24 Ohio St. 166, 15 Am. Rep. 604, Beale's Cas. 605. And see the cases cited in note 107, infra, all of which support this view.

trary.[105] In some states, statutes have been enacted punishing any one who shall bring into the state goods stolen in a foreign country, and such statutes have been upheld and applied to foreigners.[106]

(*d*) *Taking in One State and Carrying into Another.*—Whether the carrying into one of our states of goods stolen in another state or territory subject to the same national sovereignty, and not in a foreign country or on the high seas, is larceny at common law in the former, is a question upon which the courts have differed. Some of the courts have regarded it as the same as when goods stolen in a foreign country are brought into a state, on the ground that each state is, as to its laws, an independent sovereignty, and have held, therefore, that it is not larceny.[107] Most of the courts, however, have

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[105] State v. Underwood, 49 Me. 181, 77 Am. Dec. 254; State v. Bartlett, 11 Vt. 650.

[106] People v. Burke, 11 Wend. (N. Y.) 129.

[107] People v. Gardner, 2 Johns. (N. Y.) 477, Beale's Cas. 598; People v. Schenck, 2 Johns. (N. Y.) 479; State v. Brown, 1 Hayw. (N. C.) 100, 1 Am. Dec. 548; Lee v. State, 64 Ga. 203, 37 Am. Rep. 67; Simmons v. Com., 5 Binn. (Pa.) 617; State v. LeBlanch, 31 N. J. Law, 82; People v.

held that it is larceny in the state into which the goods are carried, on the ground that the peculiar relation of the different states as members of the Union makes the case analagous to the taking of goods in one county, and carrying them into another.[108] In most

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Loughridge, 1 Neb. 11, 93 Am. Dec. 325; Beal v. State, 15 Ind. 378; State v. Reonnals, 14 La. Ann. 278; Simpson v. State, 4 Humph. (Tenn.) 456. And see La Vaul v. State, 40 Ala. 44; Morrissey v. People, 11 Mich. 327.

[108] Com. v. Uprichard, 3 Gray (Mass.) 434, 63 Am. Dec. 762; Com. v. Holder, 9 Gray (Mass.) 7, Beale's Cas. 598; Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; State v. Ellis, 3 Conn. 185, 8 Am. Dec. 175; State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208; Myers v. People, 26 Ill. 173; Stinson v. People, 43 Ill. 397; Watson v. State, 36 Miss. 593; State v. Newman, 9 Nev. 48, 16 Am. Rep. 3; Hamilton v. State, 11 Ohio, 435; State v. Hill, 19 S. C. 435; Worthington v. State, 58 Md. 403, 42 Am. Rep. 338; State v. Bennett, 14 Iowa, 479; State v. Johnson, 2 Ore. 115. And see Cummings v. State, 1 Har. & J. (Md.) 340.

Stealing goods in the District of Columbia, and carrying them into Connecticut, was held larceny in Connecticut. State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208.

The Nevada court, following the dictum of Mr. Bishop, has held that, where goods are stolen in one state, and brought into another, mere possession in the latter with intent to steal is

of the states, the question is now set at rest by statutes expressly declaring it to be larceny to bring into the state goods stolen in another

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not sufficient to constitute larceny in the latter; but that a new and distinct larceny is committed if there is any removal or asportation of the goods animo furandi. State v. Newman, 9 Nev. 48, 16 Am. Rep. 3.

The decisions cited above seem to be based upon a consideration of "the mischiefs which would result from the establishment of a principle whereby a commerce in stolen goods might be carried on with impunity" (see Com. v. Andrews, 2 Mass. 14, 22; State v. Ellis, 3 Conn. 185, 8 Am. Dec. 175), rather than upon principle. It cannot be sustained either upon principle or upon precedent. As regards the operation of their laws, the states are as foreign to each other as are one of the states and a foreign country, like England or Canada, and there is no principle of law upon which the courts of Maine could take cognizance of a trespass in Massachusetts which would not as well authorize it to take cognizance of a trespass in Canada or in China. See the dissenting opinion of Judge Thomas in Com. v. Holder, 9 Gray (Mass.) 7, Beale's Cas. 598. If a state should punish the bringing into it of goods stolen in another state, the legislature should so provide. For the courts to do so, and, in doing so, to override the well-settled principle of law that the laws of a state have no extraterritorial effect, is the rankest kind of judicial legislation.

state. And these statutes have been held constitutional. They do not undertake to punish the offense committed in the other state, but punish the bringing of the stolen goods into the state.[109] Where a person who carries into one state goods stolen in another is guilty of larceny in the former state, a person who steals goods in one state, and sends them into another state by an innocent agent, is guilty of larceny in the latter state, but it is otherwise where they are carried into the other state by an accomplice.[110]

In those states in which a person who steals goods in one state, and carries them into another, is held guilty of larceny in the latter, the idea is not that the original larceny is punishable, but that the possession and carrying of the goods is a new larceny in the

[109] People v. Williams, 24 Mich. 156, 9 Am. Rep. 119; McFarland v. State, 4 Kan. 68; People v. Burke, 11 Wend. (N. Y.) 129; Ferrill v. Com., 1 Duv. (Ky.) 153; State v. Seay, 3 Stew. (Ala.) 123, 20 Am. Dec. 66; Alsey v. State, 39 Ala. 664; La Vaul v. State, 40 Ala. 44; Hemmaker v. State, 12 Mo. 453, 51 Am. Dec. 172; State v. Williams, 35 Mo. 229; State v. Butler, 67 Mo. 59. Compare Morrissey v. People, 11 Mich. 327.

[110] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; ante, §§ 495, 497.

state into which they are brought, and the indictment must be for this larceny, and not for the original taking.[111] The prosecution in the state in which the goods are carried proceeds on the theory that the goods have been stolen, and that there is a continuing trespass, and therefore the original taking in the other state or country must have been under such circumstances as to amount technically to larceny under its laws.[112] As we have seen in a previous section, where goods are stolen in one county, and carried into another, after having been altered in their character, an indictment for larceny in the latter county must describe the goods in their new state.[113] This applies where goods are stolen in one state, and carried into another, and the thief is indicted in the latter.[114]

(*e*) *Compound Larceny.*—If a compound larceny, such as larceny from a person or

[111] Worthington v. State, 58 Md. 403, 42 Am. Rep. 338; Morrissey v. People, 11 Mich. 327; Watson v. State, 36 Miss. 593. See ante, note 102.

[112] State v. Morales, 21 Tex. 298; Alsey v. State, 39 Ala. 664.

[113] Ante, § 499 b.

[114] Com. v. Beaman, 8 Gray (Mass.) 497.

dwelling house, is committed in one county, and the stolen property is carried by the thief into another county, an indictment will lie in the latter county for simple larceny, but it will not lie in such county for the compound larceny, since the facts making the offense compound larceny exist only in the county in which the larceny was originally committed.[115]

500. Robbery.

This is true of robbery. To constitute robbery in a particular county or state, it is not enough that the property be taken and carried away there, but it must be there taken from the person or in the presence of another, and by violence or by putting him in fear.[116] If a person, therefore, takes goods in one county or state from the person or in the presence of another, and by force or by putting him in fear, and carries them into another county or state, he is not guilty of robbery in the latter county or state, but of larceny only.[117]

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[115] 2 Russ. Crimes, 328. And see the cases following.

[116] Ante, § 370.

[117] 2 Russ. Crimes, 328; 1 Hale, P. C. 507, 536; Rex v. Thomson, 2 Russ. Crimes, 328.

501. False Pretenses.

The offense of obtaining money or property by false pretenses is certainly committed where the pretenses are made, and the money or property obtained, irrespective of where the person committing the offense may be, or where the money or property is obtained, if this is at a different place from that at which the pretenses are made.[118] In an English case, the accused wrote and posted in England a letter containing false pretenses addressed to a person out of England, and by such means induced such person to mail him a draft, which he received and cashed in England. The court held that the pretenses were made, and the money obtained, in England.[119] Undoubtedly, in this case the money was obtained in England, but it cannot properly be said that the pretenses

[118] Reg. v. Holmes, 12 Q. B. Div. 23, 15 Cox, C. C. 343; Reg. v. Stanbury, Leigh & C. 128, 9 Cox, C. C. 94; Com. v. Karpowski, 167 Pa. St. 225; Com. v. Van Tuyl, 1 Metc. (Ky.) 1, 71 Am. Dec. 455; State v. House, 55 Iowa, 473; Stewart v. Jessup, 51 Ind. 413, 19 Am. Rep. 739; State v. Shaeffer, 89 Mo. 278. Contra, U. S. v. Plympton, 4 Cranch, C. C. 309, Fed. Cas. No. 16,057.

[119] Reg. v. Holmes, 12 Q. B. Div. 23, 15 Cox, C. C. 343. Compare Com. v. Wood, 142 Mass. 459.

were made there, for the postoffice, in carrying the letter containing the false pretenses, was the agent of the accused, and the pretenses were not made until the letter was received. The decision was right, however, because the money was obtained in England. When goods are obtained in one state or country by means of false pretenses made in another, no indictment will lie in the latter, for the offense is committed in the former.[120]

When a person in one state or country sends to a merchant in another state or country, either by mail, or by an agent of the merchant, an order for goods, accompanied by false and fraudulent pretenses, and the goods are shipped to him by a carrier in accordance with the order, the delivery to the car-

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[120] See Stewart v. Jessup, 51 Ind. 413, 19 Am. Rep. 739.

A person who, in one state or country, induces a bank to cash a draft on a person or bank in another state or country, by means of false pretenses, is not guilty of obtaining or attempting to obtain money by false pretenses in the state or country in which the person or bank on whom or on which the draft is drawn resides or is located, and to whom or which the draft is forwarded by the bank cashing it. Reg. v. Garrett, Dears. C. C. 232, 6 Cox, C. C. 260.

rier is a delivery to him, and the offense of obtaining the goods by false pretenses is committed at the place of such delivery, and not at the place where he actually receives the goods.[121] A person who obtains goods by false pretenses in one state or county, and carries them into another, is not guilty in the latter of the offense of obtaining goods by false pretenses. The doctrine with respect to larceny[122] does not apply in such a case.[123] If, by means of the postoffice and an innocent agent, a person in one state obtains goods by false pretenses from a person in another state, he is guilty of the offense in the latter state.[124]

502. Embezzlement.

The offense of embezzlement, which, as we have seen, is the fraudulent conversion by a

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[121] Com. v. Karpowski, 167 Pa. St. 225; Norris v. State, 25 Ohio St. 217, 18 Am. Rep. 291. And see State v. Lichliter, 95 Mo. 408. Compare Com. v. Taylor, 105 Mass. 172.

[122] Ante, § 499.

[123] Reg. v. Stanbury, Leigh & C. 128, 9 Cox, C. C. 94.

[124] People v. Adams, 3 Denio (N. Y.) 190, 1 N. Y. 173. See, also, Reg. v. Jones, 1 Den. C. C. 551.

person of money or property intrusted to him by another, is committed in the state or county in which the money or property is converted, and not necessarily where it is received.[125] To constitute a conversion, however, there need be no disposal or expenditure of the money or property, but the offense is complete whenever a person who has been intrusted therewith forms an intent to convert it to his own use, and has possession with such intent. A person, therefore, may be indicted for embezzlement in the jurisdiction in which he had possession of the property or money with intent to convert it to his own use, or in the jurisdiction in which he fraudulently refused or failed to account for it to his employer, as it was his duty to do, although he may not have expended or disposed of it in such jurisdiction.[126] In an English

[125] Reg. v. Treadgold, 39 Law Times (N. S.) 291; People v. Murphy, 51 Cal. 376; Ex parte Palmer, 86 Cal. 631; Dix v. State, 89 Wis. 250; Campbell v. State, 35 Ohio St. 70; State v. New, 22 Minn. 76; Wallis v. State, 54 Ark. 611.

[126] Rex v. Hobson, Russ. & R. 56, 2 Leach, C. C. 975; Rex v. Taylor, Russ. & R. 63, 2 Leach, C. C. 974, 3 Bos. & P. 596; Reg. v. Murdock, 2 Den. C. C. 298, 5 Cox, C. C. 360; Reg. v. Rogers,

case, the prisoner, who was traveling salesman for a tradesman living at Nottingham, received money for his employer in the county of Derbyshire, and neglected to return and account for it, as it was his duty to do. About two months after his receipt of the money, he met his employer in Nottingham, and, when asked about the money, said that he had spent it. It was held that the evidence was sufficient to go to the jury on an indictment for embezzlement in Nottingham.[127] In another case, where a traveler employed to collect money in the country, and remit it at once to his employers in Middlesex, collected money in Yorkshire, appropriated it there, and rendered false accounts to his employers by post, it was held that he was rightfully convicted of embezzlement in Middlesex.[128]

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3 Q. B. Div. 28, 14 Cox, C. C. 22; State v. Small, 26 Kan. 209; State v. Baumhager, 28 Minn. 226; Brown v. State, 23 Tex. App. 214; Campbell v. State, 35 Ohio St. 70; State v. Bailey, 50 Ohio St. 636. And see State v. New, 22 Minn. 76. Compare Dix v. State, 89 Wis. 250.

[127] Reg. v. Murdock, 2 Den. C. C. 298, 5 Cox, C. C. 360.

[128] Reg. v. Rogers, 3 Q. B. Div. 28, 14 Cox, C. C. 22. And see State v. Bailey, 50 Ohio St. 636.

In a late Ohio case, a contract of employment was made in Lucas county, in that state, by which the accused was authorized to canvass for the sale of and sell his employer's goods in Sandusky county, and required to account therefor in Lucas county weekly, either by letter or in person, and, at his request, goods were sent by express from his employer's place of business, in Lucas county, to him in Sandusky county, where he received and sold them. He converted part of the proceeds to his own use in Sandusky county, and part in the state of New York. After the sale of the goods, he wrote a false account of the transaction to his employers, and mailed it to them on the railroad train while absconding, and they received it in Lucas county. Under these circumstances, it was held that an indictment for embezzlement would lie in Lucas county. "If the entire transaction constituting the embezzlement occurred in one county only," said the court, "the venue, as a matter of course, should be laid therein. But if the transaction extended to different counties, the authorities generally hold that the jurisdiction of the

county in which the act of conversion occurred is not exclusive.[129]

Agent Outside the State.—An agent may be guilty of embezzlement in a state without ever being personally within the limits of the state. Thus, in a California case it was held that an agent, residing out of the state of California, of a principal in the state, committed embezzlement in the state by drawing telegraphic checks on the principal, in the course of his agency, and converting the money to his own use, with intent to embezzle the same.[130]

Possession of Property Embezzled in Another State.—Following out the principle under which one who steals property in one state, and carries it into another, is held guilty of larceny in the latter, it has been held in Massachusetts that a person who embezzles property in another state, and brings it into Massachusetts, may be indicted there for embezzlement, as each moment's possession is a new conversion.[131]

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[129] State v. Bailey, 50 Ohio St. 636.

[130] Ex parte Hedley, 31 Cal. 109.

[131] Com. v. Parker, 165 Mass. 526. Knowlton, J., dissented.

Particular Statutes.—In Texas, by statute, "embezzlement may be prosecuted in any county of the state in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it." [132] In Maine, by statute, it is an offense punishable in that state if a person to whom property has been intrusted to be by him carried for hire, and delivered in another state, shall, before such delivery, fraudulently convert the same to his own use, and it makes no difference, under this statute, whether the act of conversion is within or without the state.[133]

503. Receiving Stolen Goods.

To constitute the offense of receiving stolen goods in a particular state or country, it is not only necessary that the goods be received there, but they must be stolen goods, and the larceny must have been committed against the laws of the particular state or country,—that is, they must have been stolen there. It is obvious, therefore, that, with regard to this

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[132] Cole v. State, 16 Tex. App. 461; Reed v. State, 16 Tex. App. 586; Cohen v. State, 20 Tex. App. 224.

[133] State v. Haskell, 33 Me. 127.

offense, we meet with the same difficulties and the same conflict of opinion as in the case of larceny. If goods are stolen in one county, and carried into another county of the same state, and there received, the offense of receiving stolen goods is certainly committed in the latter county. As to this there can be no question.[184] If goods are stolen in one country, and brought into another, or on the high seas, and brought into a country, and there received, the offense of receiving stolen goods is not committed, for there has been no larceny of which the courts of that country can take cognizance.[185] If goods are stolen in one of the states, or in a territory, and brought into another state, and there received, whether the offense of receiving stolen goods is committed in the latter will depend upon whether, in that state, the bringing into the state of goods stolen in another state is regarded as larceny.[186] If it

[184] Ante, § 499b.

[185] Reg. v. Carr, 15 Cox, C. C. 131, note, Beale's Cas. 774; Reg. v. Debruiel, 11 Cox, C. C. 207; ante, § 499 c. As we have seen, in several states the courts have taken a contrary view. Ante, § 499c, note 105.

[186] Ante, § 499d.

is, the offense of receiving is committed;[137] otherwise not.[138] If it is larceny to carry into a state goods stolen in another state, and a person steals goods in one state, and sends them by an innocent agent into another, one who receives them from such agent in the latter state, with knowledge that they have been so stolen, is guilty of receiving stolen goods, for, in contemplation of law, he receives them from the original thief.[139] If goods are stolen in one county, and shipped by carrier to a person in another county, in accordance with a preconcerted arrangement, delivery to the carrier is a delivery to the person to whom they are sent, and he is therefore guilty of receiving the stolen goods in the county where they are delivered to the carrier.[140]

The offense of receiving stolen goods is

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[137] Com. v. Andrews, 2 Mass. 14, 3 Am. Dec. 17; Com. v. White, 123 Mass. 430, 25 Am. Rep. 116.

[138] Ante, § 499d.

[139] Com. v. White, 123 Mass. 430, 25 Am. Rep. 116; ante, §§ 497, 499.

[140] State v. Habib, 18 R. I. 558. As we have seen, receipt and possession by an agent is sufficient to constitute a receiving. Ante, § 381(d).

committed where the goods are received, and not elsewhere. Carrying afterwards is not a new receiving.[141]

504. Forgery and Uttering.

In the absence of a statute, an indictment for forgery will lie only in the state and county in which the act of forgery is committed,[142] but it is otherwise in some jurisdictions by statute.[143] As to the locality in which a forged instrument is to be consid-

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[141] Roach v. State, 5 Cold. (Tenn.) 39; Campbell v. People, 109 Ill. 565; Licette v. State, 75 Ga. 253.

[142] Com. v. Parmenter, 5 Pick. (Mass.) 279. And see State v. Poindexter, 23 W. Va. 805; Cohen v. People, 7 Colo. 274; Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404.

[143] In Texas, by statute, forgery may be prosecuted in any county in the state in which the instrument was forged or used or passed, or attempted to be used or passed. Mason v. State, 32 Tex. Cr. R. 95.

Under a Texas statute punishing any person who, out of the state, should commit an offense punished by the laws of the state, and not requiring personal presence, it was held that an indictment would lie in Texas for forging, in another state, instruments affecting the title to lands in Texas. Hanks v. State, 13 Tex. App. 289.

ered as uttered, there is some conflict of opinion. By the weight of authority, the uttering is not complete until the instrument is transferred and comes to the hands or possession of some person other than the utterer, his agent, or servant, and the place where it is received by such other person is the place where the offense of uttering is committed.[144] And, according to this view, it is held that, if the instrument is sent by mail, the mail is the sender's agent, and the uttering is at the place where it is received, and not at the place where it is deposited in the mails.[145] In England it has been held that the instrument is to be regarded as uttered in the county or state in which it is deposited in the mail.[146] A person who forges a check in one state on a bank in another state, and obtains the money on it from a bank in the

[144] People v. Rathbun, 21 Wend. (N. Y.) 509; Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404; State v. Hudson, 13 Mont. 112; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

[145] Lindsey v. State, supra; People v. Rathbun, supra; State v. Hudson, supra; U. S. v. Wright, 2 Cranch, C. C. 296, Fed. Cas. No. 16,773.

[146] Perkin's Case, 2 Lewin, C. C. 150. See, also, U. S. v. Bickford, 4 Blatchf. 337, Fed. Cas. No. 14,591.

state in which the forgery is committed, cannot be indicted in the state in which the bank on which the check is drawn is situated, though the check is forwarded to that bank by the bank cashing it.[147]

Innocent Agent.—As was shown in another place, if a person in one state or county procures an innocent agent to utter a forged instrument in another state or county, he is himself guilty of uttering it, and may be indicted in the latter state or county.[148]

505. Homicide.

(*a*) *Injury in One County and Death in Another.*—At an early period in England, if a wound was inflicted or poison administered in one county, and the party died in consequence thereof in another, it was doubted by some whether the homicide could be punished in either, for it was supposed that a jury of the first county could not take cognizance of the death in the second, and that a jury

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[147] Thurlemeyer v. State, 34 Tex. Cr. R. 619. And see Reg. v. Garrett, Dears. C. C. 232, 6 Cox, C. C. 260; In re Carr, 28 Kan. 1.

[148] Com. v. Hill, 11 Mass. 136; Bishop v. State, 30 Ala. 34; Lindsey v. State, 38 Ohio St. 507, Beale's Cas. 404; ante, § 497.

of the second could not inquire into the wounding or poisoning in the first, the common-law rule being that a jury for the trial of facts must come from the vicinage where the matters of fact occurred.[149] Coke said that there could be no prosecution at all in such a case at common law.[150] Hale and other recognized authorities were of a contrary opinion, and maintained that the offender might be indicted, tried and punished in the county where the mortal blow was given, as "the death was but a consequence, and might be found in another county." [151] There are English cases to the same effect.[152] Some of the courts in this country have taken the same view, while others have held that the offender may be indicted, tried, and punished in the county where the death occurred.[153]

[149] 1 Chit. Crim. Law, 177, 178; 2 Hawk. P. C. c. 25, § 36; 1 East, P. C. 361; Bac. Abr. "Indictment," F.; Stout v. State, 76 Md. 317.

[150] 3 Inst. 48.

[151] 1 Hale, P. C. 426; Year Book 9 Edw. IV. p. 48; Year Book 7 Hen. VII. p. 8; 1 Hawk. P. C. c. 31, § 13; 1 East, P. C. 361.

[152] Rex v. Hargrave, 5 Car. & P. 170.

[153] State v. Bowen, 16 Kan. 475; Riley v. State, 9 Humph. (Tenn.) 646; Stout v. State, 76 Md. 317. And see People v. Gill, 6 Cal. 637; Green

In England and in most of our states the question has been set at rest by statutes. In England, by the statute of 2 & 3 Edw. VI. c. 24, the offense was made indictable and punishable in the county where the death happened.[154] This statute is old enough to be a part of our common law.[155] In some states, statutes to the same effect have been enacted, while in others statutes have been enacted making the offense indictable and punishable in the county where the blow was given, or injury otherwise inflicted, or in either county, and these statutes have been upheld as constitutional.[156]

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v. State, 66 Ala. 40, 41 Am. Rep. 744; Archer v. State, 106 Ind. 426; State v. Gessert, 21 Minn. 369.

[154] 2 & 3 Edw. VI. c. 24; 1 Chit. Crim. Law, 179; 1 Hale, P. C. 426.

[155] State v. McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301; State v. Orrell, 1 Dev. (N. C.) 139; Riley v. State, 9 Humph. (Tenn.) 646, 657.

But of course this statute does not apply in those of our states in which a conflicting statute has been enacted. State v. Stout, 76 Md. 317.

[156] Com. v. Parker, 2 Pick. (Mass.) 550; State v. Pauley, 12 Wis. 537; Riggs v. State, 26 Miss. 51; Turner v. State, 28 Miss. 684; Hicks v. Territory (N. M.) 30 Pac. 872.

(*b*) *Injury on the High Seas or in One Country or State, and Death in Another Country or State—Common Law.*—Under the common law, if a blow was given or poison administered in a foreign country or on the high seas (and not on an English ship),[157] and the person stricken or poisoned died in England, the homicide could not be punished in England, for the English courts could not take cognizance of the injury. Nor could a homicide be punished in England, when the injury was inflicted there, and the death occurred in a foreign country or on the high seas, for it was supposed that the courts could not take cognizance of the death.[158] In the absence of a statute on the subject, the same doctrine has been recognized in this country in the case of a death here from an injury inflicted in a foreign country or on the high seas,[159] and also in the case of an injury inflicted here, and causing death in a foreign country.[160] It has been held that a person

[157] Ante, § 490.

[158] 3 Inst. 48; 2 Hale, P. C. 163; 1 Hale, P. C. 426.

[159] See State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407.

[160] See Com. v. Linton, 2 Va. Cas. 205.

who administers a poison or otherwise inflicts an injury in one state or territory, resulting in death in another state or territory, cannot be punished for homicide in the latter,[161] but most courts hold that he can be punished in the former, on the ground that the homicide is committed where the injury is inflicted, and the death is a mere consequence.[162]

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[161] State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407. And see State v. Kelly, 76 Me. 331.

[162] State v. Gessert, 21 Minn. 369, Beale's Cas. 403; State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407; Hunter v. State, 40 N. J. Law, 495; U. S. v. Guiteau, 1 Mackey (D. C.) 498; Stout v. State, 76 Md. 317; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; State v. McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301; State v. Bowen, 16 Kan. 475; People v. Gill, 6 Cal. 637. And see Riley v. State, 9 Humph. (Tenn.) 646; State v. Kelly, 76 Me. 331.

There was a decision to the contrary in Com. v. Linton, 2 Va. Cas. 205.

Thus, the murder of President Garfield by Guiteau was held to have been committed in the District of Columbia, where the injury was inflicted, and Guiteau was tried and executed there, though after the injury the President was removed to Elberon, New Jersey, and died there. U. S. v. Guiteau, 1 Mackey (D. C.) 498. And in a late Maryland case, it was held, independently of any statute, that where a wound is inflicted

Statutes.—In many jurisdictions, statutes have been enacted expressly covering these

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or poison administered in Maryland, and the injured party goes or is carried into another state, and dies there, the homicide is committed and may be punished in Maryland. Stout v. State, 76 Md. 317.

The reason for this view is thus stated by Alvey, C. J., in the last-mentioned case: "In such case it is the law of the state where the mortal wound or poison is given that is violated, and not the law of the state where death may happen to occur. By the felonious act of the accused, not only is there a great personal wrong inflicted upon the person assaulted or mortally wounded while under the protection of the law of the state, but the peace and dignity of the state where the act is perpetrated is outraged; and though death may not immediately follow, yet, if it does follow as the consequence of the felonious act within the year, the crime of murder is complete. In inflicting the mortal wound, then and there the accused expends his active agency in producing the crime, no matter where the injured party may languish, or where he may die, if death ensues within the time, and as a consequence of the stroke or poison given. The grade and characteristics of the crime are determined immediately that death ensues, and that result relates back to the original felonious wounding or poisoning. The giving the blow (or poison) that caused the death constitutes the crime."

cases. By the statute of Geo. II. c. 21, it was provided that, where any person feloniously stricken or poisoned at any place out of England shall die of the same in England, or, being feloniously stricken or poisoned in England, shall die of such stroke or poisoning out of England, an indictment therefor, found by the jurors of the county in which either the death or the cause of death shall respectively happen, shall be as good and effectual in law, as well against principals as accessaries, as if the offense had been committed in the county where such indictment may be found.[163] It has been held that this statute is not in force in this country,[164] but somewhat similar statutes have been enacted in some of our states. Some of the statutes cover the case where injury is inflicted on the high seas or in a foreign country or another state, and death ensues in the state. In Massachusetts, such a statute has

[163] This statute was superseded by the statute of 9 Geo. IV. c. 31, § 7, and this, in turn, by the present statute of 24 & 25 Vict. c. 100, § 10, which is to substantially the same effect. See Reg. v. Azzopardi, 1 Car. & K. 203, 2 Mood. C. C. 289.

[164] State v. Stout, 76 Md. 317.

been held constitutional, on the ground that the homicide is committed where the death occurs.[165] Conceding that the decision is right, the ground upon which it is based is wrong. A homicide is committed where the injury is inflicted.[166] A statute punishing homicide where the injury is inflicted in the

[165] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89, Beale's Cas. 409. In this case, under such a statute, it was held that an indictment would lie against a citizen of another state, or of a foreign country, for the manslaughter of a person who died in Massachusetts in consequence of injuries inflicted upon him by the accused in a foreign vessel upon the high seas. See, also, People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320; State v. Caldwell, 115 N. C. 794.

Such a statute was held void in New Jersey as applied to an injury inflicted in New York by a citizen of New York, on the ground that the homicide in such a case is committed outside the state, and that the state has no power to punish therefor. State v. Carter, 27 N. J. Law, 499, Beale's Cas. 407. But doubt is cast upon this decision in the case of Hunter v. State, 40 N. J. Law, 495. In the latter case, Beasley, C. J., referred to what was said on this point in State v. Carter as "entirely extrajudicial," and commended the decisions in other states holding the contrary.

[166] See the cases cited in note 162, supra.

state, and the death occurs without the state, is clearly constitutional.[167]

In England, as was shown in a previous section, the statute punishing for homicide in the case of death in England from an injury inflicted on the high seas or in a foreign country was held inapplicable in the case of injury inflicted by a foreigner in a foreign vessel on the high seas or in a foreign country.[168] In this country, similar statutes have been held applicable to foreigners and citizens of other states,[169] but it is very doubtful, to say the least, whether these decisions are sound.[170]

(*c*) *Act in One Country, State, or County Taking Effect in Another.*—When a person in one country, state, or county does an act there which takes effect and causes death in

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[167] Hunter v. State, 40 N. J. Law, 495; Green v. State, 66 Ala. 40, 41 Am. Rep. 744.

[168] Reg. v. Lewis, Dears. & B. C. C. 182, 7 Cox, C. C. 277.

[169] Com. v. Macloon, 101 Mass. 1, 100 Am. Dec. 89, Beale's Cas. 409; State v. Caldwell, 115 N. C. 794.

[170] See State v. Carter, 27 N. J. Law, 499. Beale's Cas. 407; State v. Knight, Tayl. (N. C.) 65, 2 Hayw. 109, Beale's Cas. 406.

another country, state, or county, he commits the homicide in the latter. Thus, if a person in one state shoots across the state line, and kills a person in another state, the murder is committed in the latter state, and not in the former, and, if he can be apprehended in the latter state,[171] he can be punished there, but cannot be punished in the former unless by virtue of some statute.[172] The same would be true of a person who, being in one state, sends poisoned candy by mail to a person in another state, and causes his death in the latter. The principle also applies where a person on the shore shoots at and kills a person in a vessel on the sea. In such a case, the homicide is committed on the vessel, and is within the admiralty jurisdiction.[173] And where a person on one ship shoots at and kills a person on another ship, the homicide is committed on the latter, and it is punishable by the nation to which the latter belongs, but not by the nation to which the former belongs.[174]

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[171] Ante, § 494.

[172] 1 Hale, P. C. 475; State v. Hall, 114 N. C. 909, 41 Am. St. Rep. 822.

[173] Rex v. Coombs, 1 Leach, C. C. 388.

[174] U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No.

(*d*) *Homicide by Administering Poison.*— The overt act of homicide by administering poison, within the meaning of a statute, consists, not simply in prescribing or furnishing the poison, but also in directing and causing it to be taken, and therefore, if poison is prescribed and furnished to a person in one county, and he carries it into another county, and takes it there in accordance with the directions, and is poisoned and dies there, the administering is consummated, and the crime is committed, in that county.[175]

506. Abortion.

A person who, while in one state, sends a drug to a woman in another state by mail, with intent to have her take the same for the purpose of causing an abortion, which she does, is not guilty of procuring an abortion in the latter state, unless the woman does not know the nature of the drug, and is therefore an innocent agent. But he is indictable in the state to which the drug is thus sent, under a statute punishing any person who shall ad-

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14,932, Beale's Cas. 398. Compare Reg. v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox, C. C. 403, Beale's Cas. 897.

[175] Robbins v. State, 8 Ohio St. 131.

vise or procure a woman to take a drug with intent to cause an abortion.[176]

507. Assault and Assault and Battery.

An assault or an assault and battery is committed, of course, in the state or county in which the battery is inflicted or attempted, and ordinarily, therefore, there is no difficulty in determining the locality of the offense. When a force is put in motion in one jurisdiction, with intent to inflict a battery, and it takes effect in another, the offense is committed in the latter. Thus, if a person standing in one state or county shoots or throws across the line at a person standing in another state or county, he is guilty of assault and battery in the latter state or county if he strikes him, or of assault if he does not strike him; and if his intent is to murder, he is guilty in such state or county of assault with intent to murder.[177] The same is true where a person in one state or county sends poison or any other deleterious drug by mail to a

[176] State v. Morrow, 40 S. C. 221.

[177] State v. Hall, 114 N. C. 909, 41 Am. St. Rep. 822; Simpson v. State, 92 Ga. 41, 44 Am. St. Rep. 75. And see Robbins v. State, 8 Ohio St. 131; State v. Morrow, 40 S. C. 221; ante, § 494.

person in another state or county, and the latter takes it there.[178] In accordance with the principle in relation to crimes committed by means of an innocent agent, one who sends poison into another state or county by an innocent agent, and causes it to be administered there, is guilty of assault and battery in that state or county.[179]

508. Libel.

A libel is committed where, and only where, it is published. If it is published in several jurisdictions, it is an offense in each. One who publishes a libel in one jurisdiction in a newspaper which circulates also in another jurisdiction is liable to indictment in the latter.[180] A libel sent by mail is published, not where it is posted, but where it is received. Thus, where a letter containing a libel on the administration of the government, and on certain public officers, was mailed in Ireland, and addressed to and received by a person in England, it was held that it was published in England, and indictable there.[181]

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[178] See Robbins v. State, 8 Ohio St. 131.

[179] Ante, § 497.

[180] Com. v. Blanding, 3 Pick. (Mass.) 304.

509. Sending Threatening Letter.

It has been held that the offense of sending a threatening letter, where the letter is sent by mail, is committed where the letter is received.[182]

510. Nuisance.

A nuisance is committed in the jurisdiction in which the act takes effect and constitutes a nuisance, and in that jurisdiction only; but the same act may cause a nuisance and be indictable in more than one jurisdiction, and an act may cause a nuisance and be indictable in a jurisdiction in which the person doing the act has never been. According to the better opinion, therefore, a man who erects or creates a nuisance in one jurisdiction, as by depositing offensive matter in a stream or building a dam, is liable criminally as well as civilly in any other jurisdiction in which it takes effect and constitutes a nuisance.[183]

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[181] Rex v. Johnson, 7 East, 65. Contra, Rex v. Burdett, 4 Barn. & Ald. 175.

[182] People v. Griffin, 2 Barb. (N. Y.) 427; Rex v. Girdwood, 1 Leach, C. C. 142; Rex v. Esser, 2 East, P. C. 1125.

[183] 2 Hawk. P. C. c. 25. § 37; State v. Lord, 16

511. Bigamy.

The offense of bigamy is committed in the jurisdiction in which the bigamous marriage takes place, and an indictment will not lie in any other jurisdiction.[184] In some states, however, statutes have been enacted punishing persons who cohabit after a bigamous marriage, and under these statutes a conviction may be had for such cohabitation, although the marriage may have taken place in another jurisdiction.[185]

III. STATE AND FEDERAL JURISDICTION.

512. In General.—The United States, by congress, has jurisdiction to punish for offenses, but only in so far as such jurisdiction has been conferred upon it by the federal constitution. It has no common-law jurisdiction.[186]

The states have inherent jurisdiction to punish for any offenses committed within their limits,

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N. H. 357. And see Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13,446. Contra, In re Eldred, 46 Wis. 530; State v. Babcock, 30 N. J. Law, 29.

[184] State v. Barnett, 83 N. C. 615; Johnson v. Com., 86 Ky. 122; Scoggins v. State, 32 Ark. 205; Williams v. State, 44 Ala. 24.

[185] State v. Sloan, 55 Iowa, 217.

[186] Ante. § 34 et seq.

except in so far as the federal constitution has conferred exclusive jurisdiction upon congress.[187]

513. Jurisdiction Conferred upon Congress by the Federal Constitution.

(*a*) *General Clause.*—The constitution of the United States, to which instrument congress owes all its powers of legislation, expressly confers, in the different articles and sections, certain specific powers. These will be presently noticed, as will also some of the acts of congress in pursuance of such grants of power. Section 8 of article 1, after giving congress certain specified powers, contains a general clause conferring the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." [188] This clause, it will be noticed, is very broad. It authorizes any measures, including penal statutes, which are not prohibited by the constitution, and which are appropriate to carry into effect any of the powers given by the constitution, either to con-

[187] Ante, § 33 et seq.

[188] Const. U. S. art. 1, § 8, cl. 18.

gress, or to any federal department or officer, judicial or executive.[189] The word "necessary" in the clause does not mean "indispensable." If a certain measure is appropriate, and not within any constitutional prohibition, the degree of its necessity is a question within the discretion of congress, and not cognizable by the courts.[190]

It was said by Mr. Justice Field in reference to this clause: "There is no doubt of the competency of congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. * * * Any act, committed with a view of evading the legislation of congress, passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States. But an act committed within a state, whether for a good or a bad purpose, or whether with an honest or

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189 U. S. v. Fox, 95 U. S. 670; U. S. v. Shaw-Mux, 2 Sawy. 364, Fed. Cas. No. 16,268.

190 McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 413; U. S. v. Fisher, 2 Cranch (U. S.) 358, 396.

a criminal intent, cannot be made an offense against the United States unless it have some relation to the execution of a power of congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate." [191]

Particular Acts.—Among the various acts of congress which have been enacted under the power thus granted, and which are undoubtedly valid, are statutes punishing, as offenses against the United States, illegally holding public office,[192] conspiring to prevent a person from holding or accepting a federal office, or injuring a person holding such an office,[193] bribery or corruption of federal officers,[194] extortion or embezzlement by federal officers,[195] false personation of owners of public stocks or other claims against the United States, and other frauds in making or presenting claims,[196] stealing implements

[191] U. S. v. Fox, 95 U. S. 670.
[192] Rev. St. § 1787.
[193] Id. § 5518.
[194] Id. §§ 5451, 5500-5502.
[195] Id. §§ 5481-5487.
[196] Id. §§ 5435-5438.

used in stamping or printing bonds, notes, stamps, or other obligations or instruments of the United States,[197] corruption or intimidation of witnesses, jurors, or officers in the federal courts, or otherwise obstructing the administration of justice therein,[198] perjury or subornation of perjury in the federal courts, or before federal officers,[199] etc. Other acts which have been made offenses against the United States are mentioned in the paragraphs following.

(*b*) *Offenses on the High Seas and Offenses against the Law of Nations.*—Express power is given congress "to define and punish piracies and felonies on the high seas, and offenses against the law of nations." [200] This power has been exercised by congress by the enactment of statutes punishing piracy, and murder, and other felonies committed on the high seas,[201] and of various statutes punishing offenses against the law of nations,—among others, statutes punishing the viola-

197 Id. § 5453.
198 Id. §§ 5404-5407.
199 Id. §§ 5392, 5393.
200 Const. U. S. art. 1, § 8, cl. 10.
201 Rev. St. §§ 5339, 5340, 5346, et seq.

tion of safe-conducts and passports,[202] the suing out or executing of any writ or process against any minister of any foreign prince or state, or his servants,[203] or assaults or other violence against a foreign minister,[204] counterfeiting or forging foreign coins, securities, or stamps,[205] breaches of neutrality, as by accepting or executing within the jurisdiction of the United States a commission to serve a foreign state against a state at peace with the United States,[206] enlisting within the United States, or going out of the United States with intent to enlist, in the service of a foreign state,[207] fitting out and arming, within the United States, any vessel, with intent that it shall be employed in the service of a foreign state to cruise or commit hostilities against a state at peace with the United States,[208] increasing or augmenting, within the United States, the force of any

[202] Id. § 4062.
[203] Id. §§ 4063, 4064.
[204] Id. § 4062.
[205] Id. §§ 5457, 5465.
[206] Id. § 5281.
[207] Id. § 5382.
[208] Id. § 5283.

armed vessel of a foreign state at war with a state with which the United States are at peace,[209] beginning or setting on foot, within the United States, or providing or preparing the means for, any military expedition or enterprise against a state at peace with the United States,[210] etc.

The clause of the constitution above quoted gives congress the power to punish any act whatever that offends against the law of nations, whether the act affects foreign states themselves, or merely the subjects or citizens thereof. It gives the power to punish the counterfeiting, within its jurisdiction, of the notes, bonds, and other securities issued by foreign governments, or by corporations under their authority, and such a statute has been enacted.[211]

(*c*) *Offenses in the District of Columbia, and in Forts, Arsenals, Dockyards, etc.*— Congress is also expressly empowered "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten

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[209] Id. § 5285.

[210] Id. § 5286.

[211] Act Cong. May 16, 1884 (23 Stat. 22); U. S. v. Arjona, 120 U. S. 479.

miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." [212] Under this clause, congress has passed various statutes punishing offenses against the person, as murder, rape, assaults, etc., and offenses against property, as larceny, robbery, false pretenses, forgery, etc., offenses against the habitation, as burglary and arson, and other burnings, and many other offenses, when committed in the District of Columbia or within any fort, dockyard or other place or district within the exclusive jurisdiction of the United States.[213]

This clause of the constitution, and the act of congress, including the words "or any other *place* or district" under the exclusive jurisdiction of the United States, has reference to such places only as are, like the places specifically mentioned, in their nature fixed

[212] Const. U. S. art. 1, § 8, cl. 17.

[213] Rev. St. U. S. § 5339 et seq.

and territorial, and it does not apply to a vessel, even though it may be a ship of war of the United States.[214]

(*d*) *Treason.*—The federal constitution also declares that "treason against the United States shall consist only in levying war against them, or adhering to their enemies, giving them aid and comfort," and that "congress shall have the power to declare the punishment of treason." [215] In pursuance of this, congress has enacted laws punishing treason and misprision of treason,[216] treasonable correspondence with a foreign government,[217] recruiting soldiers or sailors to serve against the United States,[218] and other treasonable acts.[219]

(*e*) *Revenue and Custom Laws.*—The constitution expressly gives congress the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the

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[214] U. S. v. Bevans, 3 Wheat. (U. S.) 336.
[215] Const. U. S. art. 3, § 3.
[216] Rev. St. §§ 5331-5333.
[217] Id. § 5335.
[218] Id. § 5337.
[219] Id. §§ 5334-5338.

United States." [220] This, and the general clause above referred to, clearly confer upon congress the power, not only to provide for the collection of taxes, customs duties, etc., but also to punish, as offenses against the United States, fraudulent violation or evasion of the revenue and custom laws.[221]

(*f*) *Foreign and Interstate Commerce.*—The constitution gives congress the power "to regulate commerce with foreign nations, and among the several states," [222] and, under this and the general clause above referred to, it may constitutionally enact penal laws in relation to commerce.[223] Thus, it may punish desertion by seamen, the carrying of explosives,[224] obstruction of railroad trains employed in commerce between the states, and other acts in connection with foreign or interstate commerce.

(*g*) *Commerce with Indians.*—The constitution gives congress the power "to regu-

[220] Const. U. S. art. 1, § 8, cl. 1.

[221] Rev. St. U. S. §§ 1789, 3095 et seq., 5443-5448, 5452.

[222] Const. U. S. art. 1, § 8, cl. 3.

[223] Rev. St. U. S. § 4131, et seq.; Supp. Rev. St. p. 529 et seq.

[224] Rev. St. U. S. § 5355.

late commerce * * * with the Indian tribes," [225] and under this and the general clause it may enact penal laws in relation to commerce with the Indian tribes.[226] Thus, it may prohibit and punish traffic in spirituous liquors with Indians, and it may do so within as well as without the limits of a state.[227]

(*h*) *Naturalization.* — The constitution gives congress the power "to establish a uniform rule of naturalization * * * throughout the United States," [228] and this and the general clause authorize it to punish as offenses against the United States false personation, forgery, perjury, and other frauds in connection with naturalization proceedings, the fraudulent use of a certificate of naturalization, or the use of forged certificates, etc.[229]

(*i*) *Bankruptcy.*—The constitution also gives congress the power "to establish * * * uniform laws on the subject of bankruptcies

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[225] Const. U. S. art. 1, § 8, cl. 3.

[226] Rev. St. U. S. § 2127 et seq.

[227] U. S. Shaw-Mux, 2 Sawy. 364, Fed. Cas. No. 16,268.

[228] Const. U. S. art. 1, § 8, cl. 4.

[229] Rev. St. U. S. §§ 5395, 5424, et seq.

throughout the United States."[230] This clause, and the general clause heretofore mentioned, not only gives congress the power to provide for proceedings in bankruptcy, and for distribution of the property of bankrupts among their creditors, but it also gives it the power to punish frauds and other wrongs in connection with bankruptcy proceedings.[231]

The bankruptcy act of 1898 punishes any person who shall knowingly and fraudulently appropriate to his own use, embezzle, spend, or unlawfully transfer any property, or secrete or destroy any document, belonging to a bankrupt estate, which has come into his charge as trustee. It also punishes any person who, while a bankrupt, or after his discharge, shall knowingly and fraudulently (1) conceal from his trustee any of the property belonging to his estate in bankruptcy; or (2) make a false oath or account in, or in relation to, any proceeding in bankruptcy; or (3) present under oath any false claim for proof against the estate of a bankrupt; or (4) use any such claim in composition, personally or

[230] Const. U. S. art. 1, § 8, cl. 4.

[231] U. S. v. Fox, 95 U. S. 670.

by agent, proxy, or attorney, or as agent, proxy, or attorney; or (5) receive any material amount of property from a bankrupt after the filing of the petition, with intent to defeat the bankrupt act; or (6) extort or attempt to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

It also punishes any person who shall knowingly (1) act as a referee in a case in which he is directly or indirectly interested; or (2) purchase, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refuse, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest, when directed by the court so to do.

All indictments or informations under the act must be found or filed within one year after commission of the offense.

(*j*) *Counterfeiting Securities and Coin of the United States.*—The constitution gives congress express power "to provide for the punishment of counterfeiting the securities

and current coin of the United States."[232] And statutes providing for the punishment of such offenses have been enacted.[233]

(*k*) *Post Offices and Post Roads.*—The constitution also gives congress the power "to establish post offices and post roads,"[234] and under this clause, and the general clause before mentioned, congress not only has the power to establish post offices and post roads, but it also has the power, as an incident thereto, to punish acts in connection with the post offices and post roads established by it, as larceny or embezzlement from the mails, obstruction of the mails, etc.[235]

(*l*) *Patents and Copyrights.*—The constitution gives congress power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."[236] Under this clause, and the general clause heretofore mentioned, congress has the power to protect pat-

[232] Const. U. S. art. 1, § 8, cl. 6.

[233] Rev. St. § 5457 et seq. That the states may also punish counterfeiting, see post, § 514b.

[234] Const. U. S. art. 1, § 8, cl. 7.

[235] Rev. St. § 5463 et seq.

[236] Const. U. S. art. 1, § 8, cl. 8.

ents and copyrights granted under the patent and copyright laws enacted by it, and to punish fraud and other wrongs in connection therewith.[237]

(*m*) *Army and Navy.*—The constitution empowers congress to raise and support armies, to provide and maintain a navy, and "to make rules for the government and regulation of the land and naval forces." [238] Under this power, and under the general clause heretofore referred to, congress has the power to enact any penal laws which may be necessary or proper in relation to the army and navy, as, for example, a law punishing larceny or embezzlement of arms and other ordnance.[239] It may also constitutionally punish, as an offense against the United States, the receipt of an excessive fee by an agent employed to collect a pension,[240] detention from a pensioner of money collected for him as his pension,[241] and embezzlement by a guardian of

[237] See Rev. St. §§ 4901, 4963.

[238] Const. U. S. art. 1, § 8, cls. 12-14.

[239] Rev. St. U. S. § 5439.

[240] U. S. v. Marks, 2 Abb. U. S. 534, Fed. Cas. No. 15,721.

[241] U. S. v. Fairchilds, 1 Abb. U. S. 74, Fed. Cas. No. 15,067.

his ward's pension money.[242] And it may punish offenses committed on a ship of war, wherever she may be, even though in waters within the jurisdiction of a particular state.[243]

(*n*) *Elections.*—The constitution provides that the times, places, and manner of holding elections for senators and representatives in congress shall be prescribed by the state legislatures, but declares that congress "may at any time, by law, make or alter such regulations, except as to the place of choosing senators." [244] This provision not only gives congress the power to regulate the time, place, and manner of voting for representatives in congress, but it also gives it the power to protect the persons voting or entitled to vote, by appropriate statutes, penal or otherwise, from violence or intimidation, and the election itself from fraud and corruption.[245] Congress has no power, however, to regulate

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[242] U. S. v. Hall, 98 U. S. 343.

[243] U. S. v. Bevans, 3 Wheat. (U. S.) 336, 390.

[244] Const. U. S. art. 1, § 4.

[245] Ex parte Siebold, 100 U. S. 371; In re Coy, 127 U. S. 731; Ex parte Yarbrough, 110 U. S. 651; U. S. v. Quinn, 8 Blatchf. 48, Fed. Cas. No. 16,110; U. S. v. Gale, 109 U. S. 65; U. S. v. Munford, 16 Fed. 223.

elections of state officers, or to punish fraud or intimidation in connection therewith,[246] except in so far as such power may be conferred under the fifteenth amendment of the constitution, hereafter referred to. Presidential electors are state officers, within this rule.[247]

(*o*) *Slavery and the Slave Trade.*—By the thirteenth amendment to the constitution it is declared that "neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and that "congress shall have the power to enforce this article by appropriate legislation." [248] In pursuance of this power, congress has passed statutes punishing various acts for the purpose of preventing slavery and the slave trade,—as the confining or detaining of negroes on board vessels with intent to enslave, and offering or attempting to sell

[246] In re Green, 134 U. S. 377; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Reese, 92 U. S. 214; U. S. v. Amsden, 6 Fed. 819.

[247] In re Green, 134 U. S. 377.

[248] Const. U. S. amend. 13.

negroes on board such vessels, etc.;[249] seizing negroes on a foreign shore, or decoying, carrying or receiving them with intent to enslave;[250] bringing them into the United States, or holding or selling them as slaves;[251] equipping vessels for the slave trade;[252] transporting persons to be held as slaves;[253] hovering on the coast of the United States with slaves on board;[254] serving on vessels engaged in the transportation of slaves;[255] serving on a foreign vessel engaged in the slave trade;[256] kidnapping with intent to enslave.[257]

(*p*) *Civil Rights—Const. art. 4, § 2.*—The constitution declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."[258] This provision prohibits any

[249] Rev. St. § 5375.
[250] Id. § 5376.
[251] Id. § 5377.
[252] Id. § 5378.
[253] Id. § 5379.
[254] Id. § 5380.
[255] Id. § 5381.
[256] Id. § 5382.
[257] Id. § 5525.
[258] Const. U. S. art. 4, § 2.

state from denying to a citizen of another state, while within its limits, any privilege or immunity of its own citizens as such, and congress has the power to enforce the same by penal legislation.[259]

Thirteenth Amendment.—The thirteenth amendment to the constitution, referred to in a preceding paragraph,[260] went no further than to prohibit slavery or involuntary servitude. It secures the civil right of liberty, but creates no other civil rights.[261] Thus, it does not prevent discrimination between negroes and white citizens with respect to accommodations in schools, railroad cars, hotels, etc., and does not give congress the power to punish individuals for denying to negroes equal accommodations.[262]

Fourteenth Amendment.— The fourteenth

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259 See, as to this clause, Slaughter-House Cases, 16 Wall. (U. S.) 75; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; U. S. v. Cruikshank, 92 U. S. 555.

260 Ante, § 513o.

261 Civil-Rights Cases, 109 U. S. 3; Donnell v. State, 48 Miss. 676, 12 Am. Rep. 375; State v. Strauder, 11 W. Va. 803, 27 Am. Rep. 606.

262 Civil-Rights Cases, 109 U. S. 3. See, also, Plessy v. Ferguson, 163 U. S. 537; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405.

amendment to the constitution provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the states wherein they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and declares that congress "shall have power to enforce, by appropriate legislation, the provisions of this article." [263]

This amendment creates no rights, except the right of citizenship. It merely prohibits the states from passing any law denying to citizens of the United States rights, privileges, or immunities to which they are entitled, as citizens of the United States; from depriving any person of life, liberty, or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws. It protects, in

[263] Const. U. S. amend. 14.

the first clause, such rights only as belong to persons as citizens of the United States, and not such as belong to persons as citizens of the states.[264] It applies, not to acts of individuals merely, which may constitute an invasion of the rights of citizens of the United States, but to the invasion or denial of such rights by the states,[265] and therefore congress has no power, by virtue of the amendment, to punish acts of individuals merely, as distinguished from acts by or under authority of the state.[266] For this reason, an act of congress (the Civil Rights Act of 1875) making it an offense for the proprietors of hotels, public conveyances, theaters, etc., to deny equal accommodations to any persons, was held un-

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[264] Slaughter-House Cases, 16 Wall. (U. S.) 36; U. S. v. Sanges, 48 Fed. 78; People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232.

For this reason it does not secure the right to attend the public schools of a state. People v. Gallagher, supra. And see Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738.

[265] Younger v. Judah, 111 Mo. 303, 33 Am. St. Rep. 527; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Harris, 106 U. S. 635; U. S. v. Sanges, 48 Fed. 78.

[266] Civil-Rights Cases, 109 U. S. 3, 23; U. S. v. Cruikshank, 92 U. S. 542, 555.

constitutional.[267] The same is true of the act of congress punishing conspiracies to deprive any person of equal privileges and immunities under the laws, or equal protection of the laws, for it is directed against acts of individuals only.[268]

Congress, however, has the power to punish acts of individuals depriving citizens of the United States of rights given them by the federal constitution, and therefore the supreme court has sustained acts punishing conspiracies to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or to prevent or hinder his free exercise or enjoyment thereof,[269]—as the right to inform a United States marshal of violations of the revenue laws,[270] or the right to establish a homestead claim to public

[267] Civil-Rights Cases, 109 U. S. 3, 23.

[268] Rev. St. § 5519; U. S. v. Harris, 106 U. S. 629; Baldwin v. Franks, 120 U. S. 678.

[269] In re Quarles, 158 U. S. 532; U. S. v. Waddell, 112 U. S. 76; Ex parte Yarbrough, 110 U. S. 651.

[270] In re Quarles, supra.

lands,[271] or the right to vote at an election of representatives in congress,[272] etc. Congress also has the power, under this amendment, to punish acts by state officers which constitute a violation thereof.[273]

Equal Protection of the Laws.—The provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, and which congress has the power to enforce by penal legislation, if it sees fit, has been held to prohibit a state from passing any law which discriminates injuriously against particular persons or classes, or which abridges equal civil or political privileges, or which affords less protection to life, liberty, or property to one class than another.[274] It prohibits statutes denying to a particular class of persons *equal* accommodation in public convey-

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[271] U. S. v. Waddell, supra.

[272] Ex parte Yarbrough, supra.

[273] Murray v. Louisiana, 163 U. S. 101 (discrimination in selecting and summoning jurors). And see Virginia v. Rives, 100 U. S. 313; Ex parte Virginia, 100 U. S. 347.

[274] See Wurtz v. Hoagland, 114 U. S. 606; In re Ah Fong, 3 Sawy. 157, Fed. Cas. No. 102; Donnell v. State, 48 Miss. 678, 12 Am. Rep. 375.

ances, and public places of amusement, public schools, etc.[275] But it does not prevent a statute requiring *separate* accommodations for white persons and negroes, if the accommodations are equal.[276]

Fifteenth Amendment. — The fifteenth amendment to the constitution declares that "the right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude," and that congress "shall have power to enforce this article by appropriate legisla-

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[275] See Claybrook v. City of Owensboro, 16 Fed. 297; State v. Duggan, 15 R. I. 403; People v. King, 110 N. Y. 418, 6 Am. St. Rep. 389; Ward v. Flood, 48 Cal. 50, 17 Am. Rep. 405.

[276] Carriers: Plessy v. Ferguson, 163 U. S. 537; Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 Am. St. Rep. 776; Louisville & N. O. & T. Ry. Co. v. State, 66 Miss. 662, 14 Am. St. Rep. 599.

Places of amusement: Bowlin v. Lyon, 67 Iowa, 536, 56 Am. Rep. 355; Younger v. Judah, 111 Mo. 303, 33 Am. St. Rep. 527.

Public schools: U. S. v. Buntin, 10 Fed. 730; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713; Ward v. Flood, 48 Cal. 56, 17 Am. Rep. 405; Lehew v. Brummell, 103 Mo. 546, 23 Am. St. Rep. 895.

tion." [277] Under this amendment, the authority of congress to punish offenses against the right of suffrage at state elections is limited to acts done under color of authority derived from state legislation, and does not extend to punishing individuals acting without authority.[278]

514. Exclusive and Concurrent Jurisdiction.

(*a*) *In General.*—In some cases, the jurisdiction of congress, and of the federal courts under acts of congress, is exclusive of the jurisdiction of the states and the state courts, while in other cases there is concurrent jurisdiction. If the federal constitution, or acts of congress passed in pursuance thereof, have expressly or impliedly conferred exclusive jurisdiction upon congress or upon the federal courts to punish particular acts, such acts cannot be punished by the states.[279] But if

[277] Const. U. S. amend. 15.

[278] U. S. v. Amsden, 6 Fed. 819. See, also, U. S. v. Harris, 106 U. S. 637; U. S. v. Reese, 92 U. S. 214.

[279] Ex parte Bridges, 2 Woods, 428, Fed. Cas. No. 1,862; Com. v. Felton, 101 Mass. 204; State v. Tuller, 34 Conn. 280; People v. Sweetman, 3 Park Cr. R. (N. Y.) 358; People v. Kelly, 38 Cal.

the constitution and acts of congress do not give exclusive jurisdiction to the federal courts, and a particular act, which is made punishable by an act of congress in the federal courts, is also injurious to the state in which it is committed, the state has concurrent jurisdiction to punish therefor.[280] By the terms of the federal judiciary act of 1789, the courts of the United States are vested with exclusive cognizance of all crimes that are made punishable by act of congress, except where the act of congress makes other provision.[281]

(*b*) *Forgery, Counterfeiting, and Uttering.*—It may no doubt be regarded as settled that the fact that the constitution of the Uni-

145, 99 Am. Dec. 360; State v. Kirkpatrick, 32 Ark. 117; State v. Adams, 4 Blackf. (Ind.) 146.

[280] Fox v. Ohio, 5 How. (U. S.) 410; Moore v. Illinois, 4 How. (U. S.) 13, affirming Eells v. People, 4 Scam. (Ill.) 498; State v. Tuller, 34 Conn. 280; Com. v. Fuller, 8 Metc. (Mass.) 313, 41 Am. Dec. 509; Com. v. Tenney, 97 Mass. 50; Com. v. Barry, 116 Mass. 1; Rump v. Com., 30 Pa. St. 475; State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Manley v. People, 7 N. Y. 295, per Edmonds, J.; Sizemore v. State, 3 Head (Tenn.) 26; Jett v. Com., 18 Grat. (Va.) 933.

[281] See Com. v. Felton, 101 Mass. 204, 206.

ted States gives congress the power to provide for the punishment of counterfeiting the securities or coin of the United States, and that congress has done so, does not give congress exclusive jurisdiction, and that the states also have jurisdiction to punish the counterfeiting of such securities and coin, and the uttering of such counterfeits, within their limits, as an offense against the state. The supreme court of the United States has decided that a state may punish the uttering or circulating of counterfeit coin or securities of the United States,[282] but does not seem to have passed upon the question whether the states have the power to punish the counterfeiting of such coin or securities. That they have such power, however, has repeatedly been decided by the state courts.[283] There is

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[282] Fox v. Ohio, 5 How. (U. S.) 410; Moore v. Illinois, 4 How. (U. S.) 13, affirming Eells v. People, 4 Scam. (Ill.) 498.

[283] Com. v. Fuller, 8 Metc. (Mass.) 313, 41 Am. Dec. 509; Harlan v. People, 1 Doug. (Mich.) 207; Chess v. State, 1 Blackf. (Ind.) 198; Snoddy v. Howard, 51 Ind. 411, 19 Am. Rep. 738; White v. Com., 4 Binn. (Pa.) 418; State v. Randall, 2 Aik. (Vt.) 89; Hendrick v. Com., 5 Leigh (Va.) 707; Jett v. Com., 18 Grat. (Va.) 933; Sizemore v.

apparently only one decision to the contrary.[284] It has also been held that a state may punish the forgery of a power of attorney to obtain a pension under an act of congress.[285]

(*c*) *Perjury.*—In some states it has been held that perjury in naturalization proceedings, even when the proceedings are had and the oath is taken in a state court under an act of congress, is exclusively an offense against the United States, under the act of congress on the subject,[286] and that no indictment therefor will lie in a state court,[287] but the contrary has been held in Pennsylvania and New Hampshire.[288] It has also been held that an indictment will not lie in a state court for perjury before a United States land officer,[289] or before a United States commis-

State, 3 Head (Tenn.) 26; State v. Pitman, 1 Brev. (S. C.) 32, 2 Am. Dec. 645; State v. Tutt, 2 Bailey (S. C.) 44, 21 Am. Dec. 508.

[284] Mattison v. State, 3 Mo. 421.

[285] Com. v. Shaffer, 4 Dall. (Pa.) xxvi.

[286] Ante, § 513h.

[287] People v. Sweetman, 3 Park. Cr. R. (N. Y.) 358, and cases hereafter cited.

[288] State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Rump v. Com., 30 Pa. St. 475.

[289] People v. Kelly, 38 Cal. 145, 99 Am. Dec.

sioner in a proceeding under an act of congress,[290] or before a notary public designated by congress to take depositions in a contest of an election of a representative in congress,[291] or before a commissioner in bankruptcy appointed under an act of congress.[292]

(*d*) *Larceny and Embezzlement.*— Larceny and embezzlement from the mails are within the exclusive jurisdiction of the federal courts, and an indictment therefor will not lie in a state court.[293] Nor can a state punish embezzlement of the funds of a national bank by an officer thereof, for this offense is covered by an act of congress, and the jurisdiction of the federal courts is exclusive.[294] This is true, however, only where

360. Or for perjury in an affidavit before a county clerk under an act of congress relating to the public lands of the United States. State v. Kirkpatrick, 32 Ark. 117. And see State v. Adams, 4 Blackf. (Ind.) 146.

[290] Ex parte Bridges, 2 Woods, 428, Fed. Cas. No. 1,862.

[291] In re Loney, 134 U. S. 372.

[292] State v. Pike, 15 N. H. 83.

[293] Com. v. Feely, 1 Va. Cas. 321.

[294] State v. Tuller, 34 Conn. 280; Com. v. Felton, 101 Mass. 204; Com. v. Ketner, 92 Pa. St. 372, 37 Am. Rep. 692. Nor can it punish an ac-

the embezzlement is of the funds of the bank. Notwithstanding the act of congress, a state may punish an officer of a national bank for stealing or embezzling property specially deposited by a customer of the bank, as a package of bonds or plate specially deposited in its vaults for safe-keeping, for the property in such a case is not the property of the bank.[295] In a Connecticut case it was held that, where an act of congress creating a corporation (as a national bank) provides a punishment to be inflicted upon any officer of the corporation who embezzles its property, it is not competent for the state legislature to make the same act an offense against the laws of the state; but that, where an act of congress creates a corporation within a state, and authorizes it in general terms to pursue the business of banking, it is competent for the state legislature to protect the bank, and those who deal with it, by suitable penal enactments, since such an enact-

cessary to such offense, though he may not be punishable under the act of congress. Com. v. Felton, supra.

[295] State v. Tuller, 34 Conn. 280; Com. v. Tenney, 97 Mass. 50.

ment is not predicated on, and has no relation to, any act of congress or offense created thereby. And it was therefore held that, as the act of congress authorizing the establishment of national banks, and providing for the punishment of officers of such a bank who should embezzle its property and funds, made no provision whatever for punishment in case of embezzlement or theft of the property of its customers, the state might punish embezzlement or theft by a national bank officer or employe of the property of the customers of the bank, and that embezzlement by a teller of a national bank of property deposited specially in the vaults of the bank by one of its customers was punishable under a state statute punishing officers of banks for embezzling the property of third persons deposited therein.[296] In Massachusetts it has been held that a state may punish the *larceny* of property of a national bank by its officers, though the same act may be punishable as embezzlement under the act of congress.[297] This, however, seems to go too far.

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[296] State v. Tuller, 34 Conn. 280.

[297] Com. v. Barry, 116 Mass. 1.

(*e*) *False Pretenses.*—The fact that the obtaining of money or property by false pretenses under certain circumstances is made punishable by an act of congress as an offense against the United States does not necessarily prevent an indictment for the act in a state court as an offense against the state. Thus, it has been held that a state may punish for obtaining goods on credit by false pretenses, consisting of fraudulent representations as to solvency, although the fraud may also be punishable under the federal bankruptcy act.[298]

(*f*) *Election Offenses.*—The fact that congress has the power to punish offenses at elections of representatives in congress does not deprive the states of jurisdiction to punish such offenses.[299]

(*g*) *Offenses in the Ports or Waters of a State.*—The words "high seas" in the acts of congress punishing offenses, and conferring jurisdiction upon the federal courts, mean the uninclosed waters of the ocean outside of the jurisdiction of the states,—out-

[298] Abbott v. People, 75 N. Y. 602.

[299] Mason v. State, 55 Ark. 529.

side the *fauces terrae*,—and do not include arms of the sea which are within the jurisdiction of a state.[300] Offenses there committed are not within the act of congress punishing murder and other offenses "committed upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state," but such offenses are punishable in the state courts as offenses against the state.[301]

(*h*) *United States Forts, Arsenals, Dock-yards, etc.*—The constitution of the United States, as we have seen, confers upon congress *exclusive* power to legislate over the District of Columbia, and over places purchased by the United States, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,[302] and no state has any jurisdiction to punish for offenses committed in such territory.[303]

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[300] Ante, § 488b.

[301] U. S. v. Bevans, 3 Wheat. (U. S.) 336; U. S. v. Grush, 5 Mason, 290, Fed. Cas. No. 15,268; Com. v. Peters, 12 Metc. (Mass.) 387.

[302] Ante, § 513c.

[303] U. S. v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; State v. Kelly, 76 Me. 331.

The mere purchase of land by the United States is not enough to oust state jurisdiction. The purchase must be by consent of the legislature of the state, and for one or the other of the purposes specified in the constitution.[304] Thus, where the United States purchased a cemetery in the state of Tennessee, with the consent of the state legislature, to be kept as a national cemetery, it was held that the state still had jurisdiction to punish for offenses committed therein.[305]

(*i*) *Jurisdiction Conferred by Congress on State Courts.*—In some cases, congress has undertaken to confer upon state courts jurisdiction over offenses against the United States, but it has been held that it cannot constitutionally do so. It certainly cannot compel the state courts to take jurisdiction, and, by the weight of authority, it cannot authorize them to do so.[306]

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[304] U. S. v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; Wills v. State, 3 Heisk. (Tenn.) 141.

[305] Wills v. State, 3 Heisk. (Tenn.) 141.

[306] Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 330; Ely v. Peck, 7 Conn. 240; State v. Tuller, 34 Conn. 280; U. S. v. Lathrop, 17 Johns. (N. Y.) 4.

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